

89-6300

No. \_\_\_\_\_

Supreme Court, U.S.  
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JOSEPH F. SPANIOLO, JR.  
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In The

**Supreme Court of the United States**

**October Term, 1989**

THE CITY OF KILGORE, TEXAS,

*Petitioner,*

vs.

GARY D. MOORE,

*Respondent.*

**On Writ Of Certiorari To The  
United States Court Of  
Appeals For The Fifth Circuit**

**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED FOR REVIEW

- (1) May a statement itself serve as the basis for determining that the issue addressed in that statement is one of public concern?
- (2) May a Court of Appeals, pursuant to an "independent determination," disregard express fact-findings of the District Court – even though those findings are unchallenged, are entirely reasonable, and find support in the evidence – without finding them clearly erroneous?
- (3) Is a local government constitutionally prohibited from disciplining its employee for breach of an agreement to limit the scope of the employee's public statements even though several of the statements breaching the agreement regard issues not of public concern and, hence, not protected under *Pickering/Connick* balancing principles?
- (4) May an employee by voluntarily agreeing, in advance, to limitation of his speech, alter the application or outcome of *Pickering/Connick* balancing?

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The Petitioner, The City of Kilgore, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 18, 1989.

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**OPINION BELOW**

The per curiam opinion of the Fifth Circuit appears in the Appendix, together with the opinions by Judges

Goldberg and Higginbotham. The judgment of the District Court for the Eastern District of Texas, together with the Findings of Fact and Conclusions of Law issued in that Court, also appear in the Appendix.

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## JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 18, 1989. This petition for certiorari has been filed within ninety days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

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## STATUTORY PROVISIONS INVOLVED

U. S. Constitution, First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Code, Title 42 § 1983.  
Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

United States Code, Title 42 § 1988.

Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "Civil Rights," and of Title "Crimes," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect: but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding by or on behalf of the United States of America, to enforce, or

charging a violation of a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Rules and regulations of the Kilgore Fire Department, Article 4.2A(40)

Refrain from furnishing information relative to department policy, practices, or business affairs except as authorized by the Chief of the Department.

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### STATEMENT OF CASE

Plaintiff, Gary Moore, has been a firefighter for the City of Kilgore since 1980 and remains so today. At all times relevant to this cause, Moore served as president of the Kilgore local of the Professional Firefighters' Association and acted as its spokesperson.

The evidentiary scenario logically divides into two time periods. In September and October of 1985 – the first such period – Moore, on behalf of the Firefighters' Association, fought against proposed city budget cuts, one result of which cuts would be the layoff of about fifteen firefighters. In that effort, Moore made statements to the local news media urging that the proposed reduction in firefighters would adversely affect the fire and ambulance services on which city residents relied. Moore's comments, as well as those of city fathers, received prominent coverage in the local press.

Despite the efforts of the Firefighters' Association, the citizens of Kilgore approved the proposed budget cuts and the city commission implemented them, effective October 1, 1985. As anticipated, the City laid off about fifteen Kilgore firefighters.

The second period, and the one central to this case, began early on the morning of December 26, 1985, when units from the Kilgore Fire Department were summoned to a burning home. In the course of fighting the fire and the subsequent investigation, three extraordinary events occurred: the death of a fireman, a lieutenant, from an apparent heart attack; the injury to another fireman, a captain, when he fell from a ladder; and the discovery of evidence highly suggestive of arson as the cause of the fire.

Familiar with Moore as the spokesman for the Firefighters' Association, local news reporters wasted little time in seeking his comments concerning the morning's fire. Before commenting, in an apparent effort to prevent conflict with information that the City would release, Moore decided to confer with Ron Cox, the Kilgore City Manager, about the content of any statement he might make. Accordingly, in a voluntary, unsolicited appearance at Manager Cox's office that same afternoon, Moore told Cox that the press was requesting his statement and affirmatively sought the manager's "\*\*\*\* advice and counsel on what he should say to the media \*\*\*" about the fire and its attendant circumstances. Mindful that there were still many unanswered questions about the fire's origin as well as the death and injury which had occurred that morning, and concerned that unguarded statements could negatively impact a criminal arson investigation



and the ultimate prosecution of a potential arson case, Manager Cox recommended that Moore limit his public comments to an expression of sympathy and regret on behalf of the Firefighters' Association over the loss of their fellow firefighter. Moore voiced his agreement with Cox on this tack. Accordingly, as found by the district court, Moore, as a fireman, and Manager Cox had reached "\*\*\* an agreement to limit information released \*\*\*."

Nevertheless, the next morning, Moore appeared at a public news conference and, after voicing the agreed-upon expression of sympathy, made specific statements about the fire and events at the fire scene: He discussed the units that responded to the call, the number of firefighters assigned to them, the duties of a firefighter while fighting a fire, and even speculated on possible causes for the death and the injury which had occurred the previous day. Not only did those statements breach the "agreement" with City Manager Cox, but they included factual misstatements, recklessly drawn conclusions, and false implications. Even Moore, himself, conceded that his comments about the captain's injury were "in doubt" when made and "an overstatement" on the point. As found by the trial court, the unauthorized comments had been directed at vindicating the Firefighters' Association and its public opposition to the, by then, implemented budget cuts and the resulting decrease in fire department manpower. The local news media published Moore's statements on December 27 and 28, 1985.

As a consequence of Moore's actions in derogation of his agreement with City Manager Cox and the resulting publication of his unsanctioned comments, on December



31, 1985, Cox summoned Moore to his office seeking an explanation of Moore's comments. Upon learning that the meeting was to be recorded, Moore refused an invitation to explain his actions. That day, City Manager Cox (1) suspended Moore without pay for thirty days; (2) demoted him from driver to firefighter; (3) probated him for six months; and (4) prohibited him from visiting any fire station during his suspension without first obtaining city approval to do so. Contemporaneously, City Manager Cox provided Moore with a disciplinary memo evidencing the bases for and spelling out the precise terms of the disciplinary measures imposed.

As further found by the district court, the disciplinary action was based on Moore's disregard of a directive from a superior officer, breach of the agreement to limit the information released, and the violation of Article 4.2A(40) of the rules and regulations of the Kilgore Fire Department. The district court also found that the disciplinary action was in response to: (1) Moore's statement that a shortage of manpower existed, together with his implication that the shortage caused the lieutenant's fatal heart attack and the captain's injury; (2) his statement about the structure of fire department companies and the number of firefighters comprising those companies; (3) his implication that when the captain was injured he was performing a job alone that should properly have been performed by two firefighters; (4) his characterization of the fire as an "ordinary structure fire," in light of evidence that suggested the fire was caused by arson; and (5) his statement that "we are in a position to say 'I told you so' to the city."

Moreover, it was undisputed that Moore was disciplined for the actions of December 26 and not in retaliation for his representation of the Firefighters' Association the previous Fall.

Moore subsequently instituted this action in the Federal District Court for the Eastern District of Texas, pursuant to 42 U.S.C. § 1983, on grounds that: (1) the disciplinary actions imposed violated his first amendment right to freedom of speech; and (2) Fire Department Regulation 4.2A(40) was unconstitutionally overbroad, both on its face and as applied. After a trial on the merits, the trial court rendered judgment in favor of the city, based upon Findings of Fact and Conclusions of Law which are attached as an Appendix. Moore timely filed his appeal before the Fifth Circuit Court of Appeals which reversed the decision of the trial court in a per curiam opinion, together with separate opinions by Judges Goldberg and Higginbotham, all of which are also attached as an Appendix.

Hence this petition!

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### REASONS FOR GRANTING THE WRIT

#### I. The decision below conflicts with the decisions of other Courts of Appeal.

The decision of the Fifth Circuit Court of Appeals conflicts with the decisions of other circuits with respect to the application of the balancing principles mandated under *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983), in three significant respects. First, the circuits differ as to the parameters

of the "speech" to which these principles apply. Second, at least one Circuit has reasoned that voluntary, mutually-agreed prior restraints upon speech deserve different treatment than involuntary, unagreed ones. Finally, the decisions conflict with respect to the weight they accord government's interest in the accurate announcement of information concerning its policies.

**A. The nature of the whole communication, not just selected fragments, must weigh in the *Pickering/Connick* balance.**

The Circuit Court ran afoul of the rule that

\*\*\*\* [i]t is the nature of the whole communication that must be reviewed to determine whether it is of 'public concern' – not sentences taken in isolation. \*\*\*\*

*Fiorillo v. U. S. Department of Justice*, 795 F.2d 1544, 1550 (Fed. Cir. 1986). The entirety of Moore's statements to the press comprises the "speech," and the scenario of December 26 and 27, in its entirety, comprises the context to be considered. Yet, in this case the Fifth Circuit Court of Appeals edited out of Moore's "speech" anything other than what Moore chose to emphasize. And, as to context, the court focused on the question of "mootness," to the virtual exclusion of: (1) the City's legitimate concern regarding its ongoing post-accident arson investigation, (2) the City fathers' genuine respect and concern for the deceased fireman's family, (3) the uncertainty surrounding the injury to the other fireman, (4) the City's interest in the accurate dissemination of information, and (5) Moore's earlier agreement, as a fireman, with his superiors.

- B. The voluntary, before-the-fact agreement of a public employee, narrowly drawn, to limitations on speech should alter the analysis under which actions in response to the agreement's breach are adjudged.**

The Tenth Circuit Court of Appeals has, at least impliedly so, taken the position that restrictions upon speech, when agreed to before-the-fact, are deserving of different analysis than those not so agreed. *McGurran v. Veterans Administration*, 665 F.2d 321, 323 (10th Cir. 1981)(agreed-to restrictions on the place of posting were held not unreasonable). Certainly, statements of an employee which breach a prior agreement with his employer to limit their scope constitute a clear disregard of a directive and smack of insubordination – not by virtue of their content, per se, but by virtue of the breach itself. Yet, the Fifth Circuit has in this case refused to consider the effect that Moore's breach of his agreement with the City should have on the City's abilities to discipline him.

Are any agreements which effect a limitation of the scope of a public employee's speech of any import? If so, what are the criteria for determining enforceable agreements (those for which a breach properly can be disciplined) from those not so enforceable? When an agreement to limit future speech has been reached, is *Pickering/Connick* balancing still the appropriate measure for assessing the propriety of government's actions taken in response to the breach of that agreement? If not, what is the appropriate measure? The questions are real and should be resolved by this court.

- C. The City's vital interest in the accurate announcement of its policy is a legitimate one and should weigh in the *Pickering/Connick* balance.**

The Ninth Circuit has held that the balance struck between First Amendment interests and governmental ones must consider the government's stake in the accurate announcement of its own policy. See *Kotwica v. City of Tucson*, 801 F.2d 1182 (9th Cir. 1986). Accordingly, the inaccuracy or misleading nature of an employee's speech is to be considered as a factor in the balancing equation. As observed in *Kotwica*:

"The government's stake in the accurate announcement of its own policy is more than legitimate, it is vital to constitutional rule. The personal views of individual employees do not take necessary precedence over this vital speech interest of the government itself when the employee uses an official interview to misrepresent government policy." (801 F.2d at 1184.)

According to *Kotwica*, the City's right to control dissemination of information about ongoing fire department business was a legitimate one. Public safety organizations, such as fire, police, and sheriff's departments, deal with a number of sensitive and serious matters, not all of which should be available for public consumption on demand. Undeniably, the premature, hastily considered, or inaccurate release of information about an arson investigation could have serious, potentially devastating, consequences on public safety or the reputation of the fire department itself, as well as the reputations of those persons under investigation.

Here, in sharp contrast to the teachings of *Kotwica*, the Circuit Court held the City's interest in the accurate

dissemination of information "\*\*\*\* has no weight \*\*\*" (Appendix at A-29), despite considerable testimony that:

... Moore's conclusion as to the fireman's injury was utterly false and rooted in hearsay and erroneous information,

... his account of the staffing compliment on one engine was reckless and inaccurate,

... his statements were inimical to an arson investigation, and

... Moore's comments about the injury were \*\*\* in doubt \*\*\*\*" when made and constituted "\*\*\*\* an overstatement \*\*\*\*" on the point.

Must even the day-after opinions and speculations of a public employee always triumph over the government's interest in the accurate dissemination of its policy? Does not Moore's considerable experience as a fireman, together with the proof of his considerable misstatements and inaccuracies, as well as his damning admissions of "\*\*\*\* doubt \*\*\*\*" and "\*\*\*\* overstatement \*\*\*\*" constitute evidence sufficient to sustain the district court's implied finding that the statements were made with reckless disregard of their truth or falsity? Is not this enough to satisfy the *New York Times Co. v. Sullivan* standard? See generally *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

Does the *New York Times Co. v. Sullivan* standard even apply to statements made by a public employee in his employment capacity? Despite the perception of the Circuit Court that *Pickering* requires application of the *New*



*York Times Co. v. Sullivan* standard, this Court, in *Pickering*, actually prefaced application of the *New York Times Co. v. Sullivan* standard upon its holding that the speech at issue was made by the employee "\*\*\*\* as the member of the general public he seeks to be \*\*\*." *Pickering*, 391 U.S. at 573-74. Is that precondition to be disregarded?

These three conflicts lie so near the heart of the balancing mandated under *Pickering* and *Connick* as to virtually dictate that grossly divergent results be achieved among the circuits. Yet, a primary purpose of the national court is to insure nationwide uniformity of law. It is essential that the Court address these issues to restore uniformity of application to the balancing process mandated under *Pickering* and *Connick*.

**II. A public employee cannot use the First Amendment to insulate himself from discipline for insubordination or breach of a prior agreement.**

Although, a public employee can freely express his views on public issues, Moore's comments included the public budget-cut issue only tangentially. As indicated in the findings of the District Court, the conduct for which he was disciplined smacked of insubordination and breach of an agreement with City management. Moreover, Moore's alleged exercise of freedom of speech could not preclude the City – undoubtedly mindful that because of the "nature" of firefighting, "\*\*\*\* operational efficiency and harmony among co-workers are critical \*\*\*," *Bickel v. Burkhard*, 632 F.2d 1251 (5th Cir. 1980) – from determining that Moore was unwilling to perform his duties in the manner most beneficial to the citizenry and,

hence, deserved appropriate discipline. In *Butler v. Hamilton*, 542 F.2d 835 (10th Cir. 1976), the court held that a public employee could not insulate himself from discharge for insubordination merely by holding a public press conference. Yet, the decision of the Circuit Court in this case effectively allows tangential commentary on issues of public concern to shield other, considerable insubordinate speech from even discipline, much less discharge. If the City cannot even discipline its firefighters for insubordination, it will be seriously impeded in its efforts to deliver firefighting services in a manner most beneficial to the public welfare.

Basic questions remain unanswered. When is insubordinate speech protected by the First Amendment and when is it not? Can it be that an employee – of a fire department no less – is free to engage in insubordinate conduct, without threat of discipline, so long as interposed somewhere within that conduct lies a statement arguably implicating an issue of “public concern”? Must a fire department place the protection of statements only tangentially-related to issues of public concern above those practices necessary to insure its efficient operation in its primary role, that of fighting fires? The Fifth Circuit Court of Appeals has, albeit impliedly, so held in this case.

Surely, no public employer – much less a fire department – could be expected to maintain morale and order or to efficiently and effectively perform the public services of which it is charged if its employees can so easily avert even proper discipline. Efficiency and effectiveness would be all but destroyed were lower echelon employees allowed unfettered discretion in arranging the



timing, content, and format for release of information concerning fire department business affairs. No fire department can be expected to properly provide services to the citizenry unless the release of information concerning its business affairs receives the mature consideration of the officials who will bear ultimate responsibility for the department, who may be expected to know the facts, and whose experience gives them the proper judgment as to the release of such information. Who is to run the fire department: duly elected and appointed officials, or the firefighters whom they employ? The failure of the Fifth Circuit Court of Appeals to place in proper focus the department's undeniably legitimate bases for disciplining Moore poses a serious threat to effective operation of fire departments, and public offices in general.

The Circuit Court has indulged a further misapplication of *Pickering/Connick* principles. In *Connick v. Myers*, this Court summarized the "matter of public concern" inquiry in terms of whether an employee speaks as an "employee" or as a "citizen," stating that

\*\*\*\* when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a Federal Court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.  
\*\*\*\* 461 U.S. at 147.

Thus, properly applied the *Pickering/Connick* balance must admit of the distinction between the plaintiff as employee and as citizen.

In the present case, however, the Fifth Circuit has, notwithstanding its express denial (Appendix at A-17), repudiated this distinction. For, even though recognizing the presence of personal, "employee" considerations in a context which "may appear to relate to an on-going employee matter," the Circuit Court has absolutely refused to admit of the possibility that Moore spoke as an "employee" and, without holding it clearly erroneous, has disregarded the district court's finding that Moore spoke as an employee. (Appendix at A-81.) The Circuit Court's failure to accord proper deference to the employee/citizen dichotomy poses a serious threat to this Court's painstaking efforts to formulate the proper inquiry regarding First Amendment problems in the area of public employment; similarly, it poses a serious threat to the effective operation of all public offices which merits the attention of this Court.

**III. The Circuit Court was not entitled to disregard the express factfindings of the district court without first determining them clearly erroneous.**

On appeal, Moore failed to challenge a single finding of fact of the district court; yet, the Circuit Court repeatedly ignored the district court's findings and drew inferences from the facts which the district court did not draw. For example, the Circuit Court refused to accept the findings that:

... Moore and Cox determined that Moore's comments on behalf of the Firefighters Association "\*\*\*\* would

be limited by *agreement* to expressions of sympathy for the lost firefighter because of the uncertainties surrounding the fire \*\*\*";

. . . the City Manager's actions "\*\*\*\* were based on Moore's disregard of a directive from a superior officer, breach of their agreement to limit information released, and violation of Article 4.2A(40) of the rules and regulations of the Kilgore Fire Department \*\*\*";

. . . the thrust of Moore's comments was to vindicate the Firefighters Association for its opposition to the recently-implemented budget cuts;

. . . the City Manager had a genuine concern that "\*\*\*\* unguarded statements could negatively impact a pending criminal arson investigation and the successful prosecution of the case \*\*\*";

. . . the disciplinary action was not "\*\*\*\* in retaliation for Moore's representation of the Firefighters' Association's policy position during the time prior to December 26, 1985 \*\*\*";

. . . Moore's comments primarily addressed the concerns of an *employee* organization; and

. . . Moore's detailed information about the units assigned to the fire, crew members on each unit, and their respective duties was that known only to a fireman at the time. (Appendix at A-74 - A-76, A-81.)

Rejection of those factual findings is all the more remarkable given that the Circuit Court never found even one of them to be "clearly erroneous," much less impugned their reasonableness or their evidentiary foundations! In short, the Circuit Court failed to adhere to the

time-honored standard that the evidence and inferences from that evidence must be viewed "\*\*\* in the light most favorable to the prevailing party below \*\*\*," *Daniel v. United States*, 234 F.2d 102, 106 (5th Cir. 1956), and failed to adhere to this Court's admonition, expressed in *Ander-son v. City of Bessemer, North Carolina*, 470 U.S. 564 (1985), that

If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. (470 U.S. at 574.)

The City recognizes this Court's footnote in *Connick* that "\*\*\* the inquiry into the protected status of speech is one of law \*\*\*", *Connick* 460 U.S. at 148 n.7, and agrees with the Circuit Court that this Court's First Amendment cases obligated it to examine, independently, the whole record. See, e.g., *Rankin v. McPherson*, 483 U.S. 378 (1987). However, those principles can hardly justify the whole-sale disregard of virtually all district court fact findings undertaken by the Circuit Court.

In lieu of the findings and analysis it cast aside, the Circuit Court substituted contextual analysis based primarily on the facts that the media requested Moore's commentary and subsequently printed his responses. When reduced to its lowest common denominator, this analysis may be recognized as no less than an assertion that any answer to a media inquiry comprises a statement of "public concern" sufficient to trump the government's

countervailing interests, regardless of the existence and impact of other, equally important, contextual factors. Such an approach surely runs afoul of this Court's admonition that the "public concern" inquiry must be determined "\*\*\* by the content, form, and context of a given statement, *as revealed by the whole record.* \*\*\*" *Connick*, 461 U.S. at 147-48.

If contextual factors properly before the court may ever be ignored in the *Pickering/Connick* balance, what circumstances justify casting them aside? How are the remaining, proper contextual factors to be identified? The Circuit Court's blatant misperception of the appellate court's proper role deserves the attention of this Court.

#### IV. The burdens of proof upon the parties require re-examination.

In *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977), this Court held that a plaintiff must prove constitutionally-protected behavior which was a substantial or motivating factor in the employer's complained-of conduct. That burden having been satisfied, the defendant is then required to show by a preponderance of the evidence that the same conduct would have resulted even absent protected speech.<sup>1</sup> Effectively, a "but for" test is applied to the defendant's burden in *Mt. Healthy* cases.

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<sup>1</sup> Here, the district court found legitimate bases, wholly unrelated to matters of "public concern," for the discipline dispensed by the City when the court found that "\*\*\*\* the City Manager's actions were based on Moore's disregard of a directive from a superior officer, breach of their agreement to limit information released, and violation of Article 4.2A(40) of the Rules and Regulations of the Kilgore Fire Department \*\*\*." (Appendix at A-76.)

In sharp contrast, in cases arising under Title VII of the Civil Rights Act of 1964, this Court has held that once a plaintiff shows a *prima facie* case of discrimination, the defendant must merely articulate some legitimate, non-discriminatory reason for the complained-of conduct. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Thus, in Title VII cases, the ultimate burden of persuasion *always* rests upon the plaintiff!

The basic similarities between the present case and the Title VII cases are readily apparent (both involve conduct by an employer against an employee for allegedly constitutionally-impermissible reasons). On the other hand, differences sufficient to justify the extreme divergence of burdens are not apparent and, it is believed, nonexistent. There is no logical reason why the standards set out in *Burdine* should not apply with equal effect in *Mt. Healthy* cases. Certainly, it is difficult to rationalize a basis for affording greater protection to disciplined or discharged employees than to those persons historically subjected to invidious discrimination. For this reason, the Court must examine its decisions in *Mt. Healthy* and *Burdine* and either uncover a rational purpose for the extreme divergence of burdens in these two similar areas of civil rights law or, alternatively, absent such a rational distinction, determine which approach is the proper one and apply it in all such cases.

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## CONCLUSION

Based on the foregoing reasons, a writ of certiorari should issue to review the judgment of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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**APPENDIX NO. 1**

**IN THE UNITED STATES COURT OF  
APPEALS FOR THE FIFTH CIRCUIT**

**NO. 87-2783**

**GARY D. MOORE,**  
**Plaintiff-Appellant**

**VERSUS**

**CITY OF KILGORE, TEXAS,**  
**Defendant-Appellee.**

---

**Appeal From the United States District Court  
For the Eastern District of Texas**

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**JULY 18, 1989**

**BEFORE GOLDBERG, HIGGINBOTHAM, and DAVIS,**  
**Circuit Judges**

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**Gary D. MOORE, Plaintiff-Appellant,**

**v.**

**The CITY OF KILGORE, TEXAS,**  
**Defendant-Appellee.**

**No. 87-2783.**

**United States Court of Appeals,**  
**Fifth Circuit.**

**July 18, 1989.**

Fire fighter brought action challenging his suspension for making statements to press following fire in

which one fire fighter died and another was injured. The United States District Court for the Eastern District of Texas, William M. Steger, J., entered judgment in favor of city, and fire fighter appealed. The Court of Appeals, in an opinion by Goldberg, Circuit Judge, held that: (1) discipline of fire fighter for making his remarks to press violated his First Amendment rights, and (2) in an opinion by Patrick E. Higginbotham, Circuit Judge, held that court would not consider facial challenge to fire department regulation governing speech by members of the department.

Reversed and remanded.

Goldberg, Circuit Judge, dissented in part in his opinion.

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Appeal from the United States District Court for the Eastern District of Texas.

Before GOLDBERG,  
HIGGINBOTHAM and DAVIS, Circuit Judges.

PER CURIAM:

Appellant Gary Moore brought this 42 U.S.C. § 1983 suit against the City of Kilgore to remedy a violation of Moore's First Amendment rights. This per curiam opinion explains the panel's holdings.

Part I of Judge Goldberg's opinion concerns the application of Kilgore Fire Department Rule and Regulation 4.2A(40) to Moore's speech. We unanimously reverse and remand for further proceedings on this issue. Judge

Goldberg's opinion constitutes the reasoning of the court on this issue.

There is a second issue in this case concerning the facial validity of the Kilgore Rule. An opinion by Judge Higginbotham, in which Judge Davis joins, constitutes the panel's holding affirming the District Court's judgment that Moore's facial attack upon the rule fails. Part II of Judge Goldberg's opinion constitutes a dissent from the panel's affirmance of the district court's judgment concerning the facial validity of the Rule.

GOLDBERG, Circuit Judge:

Fiercely words may both ignite public discourse and set aflame an employer's ire. The City of Kilgore, appellee-defendant, ("City") maintains that we should smother the words of Gary Moore, appellant-plaintiff ("Moore"). Moore invites us to hold that his words are a matter of public concern which weigh in his favor under the *Pickering/Connick*<sup>1</sup> balancing test. Moore also seeks to overturn the City's Fire Department Speech Regulation, Article 4.2A(40), as facially unconstitutional.

Firefighter Gary Moore works for the City of Kilgore Fire Department. He spoke to the news media on December 26, 1985, concerning a fire which had occurred that

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<sup>1</sup> *Rankin v. McPherson*, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987) (*Pickering/Connick* balancing test); *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983); *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

day. The City disciplined Moore for his speech. Moore brought a 42 U.S.C. § 1983 action for damages, declaratory and injunctive relief against the City of Kilgore. After a bench trial, the court entered judgment for the City. Moore appeals on three grounds: (1) that the district court erred when it found that some of Moore's statements are not "protected speech;" (2) that the district court erred in its application of the *Pickering/Connick* balancing test to one statement which the court found to be a matter of public concern; and (3) that the district court erred in determining that Article 4.2A(40) ("Rule") of the Rules and Regulations of the Kilgore Fire Department was facially constitutional. We agree with Moore on his first two objections; we reverse the district court and remand for further proceedings consistent with this opinion.

#### FACTS - LAY OF THE TERRAIN

In 1985, the City of Kilgore experienced serious financial difficulties. With oil profits dwindling, the City had to cut city services. The City Commissioners and the City Manager, Ron Cox, determined that they would have to lay off forty employees by October 1, 1985. The fire department was the hardest hit with eleven projected lay-offs for a total reduction of fifteen positions (four vacancies were left unfilled).

The layoff of firefighters did not occur behind closed doors. At the trial before the district court, Moore introduced into evidence numerous newspaper articles which document the controversy surrounding the staffing of the fire department. For example, one article on October 6,

1985 that appeared in the *Tyler - Courier - Times - Telegraph* began, "Controversy is smoldering here between city officials and firemen - targets of recent city budget cutbacks. The key spokespersons in the battle of words are Gary Moore, president of an organized firefighters' 'union,' and Ron Cox, Kilgore city manager." In another newspaper article which ran on October 2, 1985, the article quotes a statement that the firefighters published: "It is difficult not to be emotional when we are talking about the lives and property of citizens whom we have sworn to protect."

Moore began his employment as a Kilgore firefighter in 1980. He is a third generation firefighter, following in the footsteps of his grandfather, father, and uncle. He has been president of the Kilgore Professional Firefighters Association, Local 2996, since July, 1985, and serves as the spokesperson for the firefighters. The Association is not recognized as a collective bargaining agent for employees of the Kilgore Fire Department, but is recognized in the Kilgore area as the voice of the firefighters. Ron Cox, the City Manager, acted as the spokesperson for the City during the latter half of 1985.

In the early morning hours of December 26, 1985, the Kilgore Fire Department responded to a house fire. Although a suspected result of arson, the fighting of the fire was essentially routine. The fire, however, produced tragic results. One firefighter, Hawthorne, died of an apparent heart attack while fighting the fire, and a second, Captain Jackson, fell from a ladder, sustaining serious injuries requiring hospitalization. Media representatives approached Moore for comments concerning the tragedy. Moore initially demurred. He went to see the

City Manager, Cox, for two purposes: (1) to assist in expediting the paperwork to secure benefits for the survivors of the deceased fireman; and (2) to inform Cox of the inquiry from the press and coordinate his response concerning the death with the City's plans.

The fire chief was in Cox's office when Moore arrived on December 26, 1985. The two had been discussing various aspects of the fire. Moore was welcome; the meeting was cordial. Moore stated the reasons for his visit. As to the reporters' inquiries, Cox suggested that Moore limit his response to an expression of sympathy for the family of his deceased colleague.

The following morning, December 27, 1985, the City held a press conference, *after* which the media representatives sought comment from Moore. Moore responded with a message of condolence for the family. Not surprisingly, the press persisted with questions about the fire reflecting back to the ongoing debate regarding the staffing decisions. Moore answered direct questions concerning the fire, firefighting techniques, and the duties of firefighters, in fighting blazes. Specifically, the newspaper article (which was attached to the disciplinary memorandum discussed below that Cox eventually gave to Moore) stated:

Gary Moore, president of the Kilgore Professional Fire Fighters Association, to which Hawthorne belonged, commented: "B.J. was a very nice man and a good firefighter. Firefighters get to be pretty close. We're just sickened over something like this."

Moore said he was "not saying that B.J. wouldn't have had a heart attack" if the fire had not occurred, but contended the incident



pointed out that "we don't have enough manpower."

He added that the fire department sent No. 1 engine - a two-man company - and No. 3 engine - a three-man company, and then called in firefighters from Overton, Sabine and Liberty City, the Kilgore Rescue Unit and four or five off-duty firemen.

"It's common practice to have a 'butt man' to hold the ladder. Jackson didn't have that." Moore said, "The other man had to stay with the engine."

"I just want to say, 'I told you so.' " Moore added referring to his earlier charges that the fire department is understaffed following a lay-off of 15 firemen in October.

City officials declined to respond to Moore's charges, other than point out that ice was on the ladder and concrete, making them slippery.

"We're dealing with a shortage of manpower. It may not have made a difference in B.J. Hawthorne's heart attack. We really don't know. But there was no doubt it contributed to Capt. Jackson's injury." Capt. Jackson had fallen from a ladder. The latter statement referred to the absence of a "buttman" to hold Jackson's ladder as he climbed, a fundamental practice, according to Moore.

Publication of these comments spurred Cox to order Moore to report to his office on December 31, 1985. When Moore arrived, Cox had prepared a memorandum imposing disciplinary sanctions, including: (1) suspension without pay for 30 days; (2) demotion from the status of driver to firefighter; (3) probation for six months; and (4) prohibition from visiting any fire station for any reason

during the suspension without the prior approval of the fire chief. In the disciplinary memorandum, Cox wrote:

Both Chief Duckwork and I directed you to say as little as possible and not discuss the events surrounding the fire because of the delicate nature of the circumstances with the potential of arson involved, and the death of a fireman during the fire. Specifically, I told you to be very, very careful with what you said. I recommended you limit your comments to indicate your regrets over Lt. Hawthorne's death on behalf of the Association.

At the close the conversation, you told me that you would say no more than what we had discussed in this conversation to the media and I agreed. You also indicated, with our agreement, that you would be at the press conference to be held Friday morning, December 27, in order to express the regrets of the Association regarding Mr. Hawthorne. You attended that press conference.

On Friday, December 27, the Kilgore News Herald carried the newspaper article, a copy of which is attached to this memo, that quotes you discussing several details of the fire itself. On Friday evening of that same day, you conducted a television interview, on Channel 7, Tyler, and discussed various details of the fire in violation of this directive. And finally, articles in the Friday evening, December 27, and Saturday morning, December 28, (also attached) issues of the Longview Journal, again quoted you describing various details of the fire itself.

Cox went on in the memorandum to state:

You have misrepresented to me your intentions. You had stated you would say no more than what we had discussed and agreed upon, and



proceeded to discuss with the media what you considered the facts to be regarding the fire. This, again, is insubordination. For your information, insubordination is defined in the dictionary as "not being subordinate or obedient." To be subordinate is to be "subject or subservient to another." It is our responsibility and duty as employees to be subject to the rules and regulations of the City.

Mr. Moore, you are an employee of this City. You are not expected to agree with every policy or every directive that is given to you, but you are expected to follow them. You have been supplied with a copy of the Fire Department Rules and Regulations and are expected to know what those rules and regulations are. In addition, you were directed verbally to refrain from any discussion of the events surrounding the fire.

The memorandum concluded with Cox's directive to Moore: "There will be no more public announcements by you regarding your opinion of any policies or directives issued by this City." The memorandum cited and quoted article 4.2A(40) of the Rules and Regulations of the Kilgore Fire Department which directs firefighters to:

Refrain from furnishing information relative to department policy, practices, or business affairs except as authorized by the Chief of the Department.

After an unsuccessful attempt to secure a reconsideration of the disciplinary order, Moore filed this suit seeking declaratory and injunctive relief, damages, and attorney's fees for infringement of his First Amendment rights. Trial on the merits was advanced and consolidated

with the hearing on the application for injunctive relief. Fed.R.Civ.P. 65(a).

After a bench trial, the district court denied Moore all relief. It did find that Moore had been disciplined for his public comments. The court, however, concluded that only the reference to a manpower shortage was even arguably a matter of public concern, and that the remainder of the statements were merely "carping criticisms, causation analysis that approaches fingerpointing, and divulgence of possibly sensitive information about the composition and duties of fire department companies in emergency situations." In addition, the court concluded that Moore's First Amendment right to speak out on matters of public concern was outweighed by a legitimate governmental interest in the efficient operation of the city fire department. Finally, the court found that Article 4.2A(40) of the Kilgore Fire Regulations was facially constitutional. The district court entered judgment for the City. Moore appeals.

## DISCUSSION

The City of Kilgore disciplined Gary Moore for the comments he made on December 26, 1985, concerning the fire in which two firefighters were injured, one fatally. Neither party contends otherwise.

We undertake a two-part inquiry in this case: first, we will pass upon the district court's application of the *Pickering/Connick* balancing test to Moore's speech; and second, we will consider the facial constitutionality of the Kilgore Fire Department Speech Regulation. The district court held (1) that the First Amendment did not protect

Moore's speech; and (2) that the Speech Regulation is facially constitutional. We reverse the first determination. I write separately in dissent concerning the facial constitutionality of the Kilgore Rule.

#### I. Pickering/Connick Balancing Test As Applied To Moore's Speech

To begin, we discuss the application of the Kilgore Fire Department Speech Regulation to Moore's comments in light of *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), and *Rankin v. McPherson*, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987). To accomplish this first step we need to decide whether Moore's speech constitutes commentary upon matters of public concern, and if so, whether the interest of the City as an employer, "in promoting the efficiency of the public services it performs through its employees" outweighs Moore's and the public's interest in the speech.

A city may not discipline an "employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech." *Rankin v. McPherson*, 483 U.S. 378, 107 S.Ct. 2891, 2896, 97 L.Ed.2d 315 (1987); *Perry v. Sinderman*, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972). The City disciplined Moore on the basis of his speech pursuant to Kilgore Fire Department Regulation, Article 4.2A(40), which states: "Refrain from furnishing information relative to department policy, practices, or business affairs except as authorized by the Chief of the Department."

### A. *Matters of Public Concern*

A threshold issue in determining whether Moore's speech is constitutionally protected is whether Moore's speech may be "fairly characterized as constituting speech as a matter of public concern." *Connick v. Myers*, 461 U.S. 138, 146, 103 S.Ct. 1684, 1689-1690, 75 L.Ed.2d 708 (1983).

"Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147-48, 103 S.Ct. at 1690-1691. Such an inquiry is a question of law, not fact. *Connick* 460 U.S. at 148 n. 7, 103 S.Ct. at 1690-1691 n. 7. And we have an obligation, imposed by the Supreme Court's First Amendment cases, to examine independently the *whole* record to be sure that "the judgment does not constitute a forbidden intrusion on the field of free expression." *Rankin v. McPherson*, 483 U.S. 378, 107 S.Ct. 2891, 2897 n. 9, 97 L.Ed.2d 315 (1987) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86, 84 S.Ct. 710, 728-729, 11 L.Ed.2d 686 (1964)).

We, therefore, now examine the record as a whole paying particular attention to the content, context, and form of Moore's speech to see if the speech concerns matters of public concern. But as we undertake this task, we are mindful that a speech's content, form and context must be considered as a whole package, and the significance of these factors will differ depending on the circumstances of the particular situation.

Issues which touch upon matters of public concern are limitless. In this case, the content of Moore's speech concerned a possible shortage of firefighters to battle a

blaze in which one firefighter died from a heart attack and another fell from a ladder. Moore commented that "the fire department sent No. 1 engine – a two-man company – and No. 3 engine – a three-man company, and then called in firefighters from Overton, Sabine, Liberty City, the Kilgore Rescue Unit and four or five off-duty firemen." All these comments concern whether the fire department was understaffed. Moore was also quoted as saying "It's a common practice to have a 'butt man' to hold the ladder. [Captain Jackson, the firefighter who was seriously hurt when he fell from a ladder,] didn't have that." Moore stated, "The other man had to stay with the engine." Again, Moore's comments touched upon the possibility of a staffing shortage. Even Moore's comment "I just want to say 'I told you so'" refers to his past comments, all of which concerned the staffing of the fire department.

The public, naturally, cares deeply about the ability of its Fire Department to respond quickly and effectively to a fire.<sup>2</sup> If staffing shortages potentially threaten the

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<sup>2</sup> See *Rankin v. McPherson*, 483 U.S. 378, 107 S.Ct. 2891, 2897-98, 97 L.Ed.2d 315 (1987). In *Rankin* the Supreme Court held that the statement at issue "plainly dealt with a matter of public concern." The case concerned a clerical employee who remarked, after hearing of an attempt on the life of the President, "If they go for him again, I hope they get him." The Supreme Court characterized this statement a matter of public concern because it was made in the course of a conversation addressing the policies of the President's administration. *Rankin*, 107 S.Ct. at 2897; see generally *Brown v. Texas A & M University*, 804 F.2d 327, 336-38 (5th Cir.1986) (need to protect whistleblowers). The Court went on to note that "debate on public issues should be uninhibited, robust, and wide-open,

ability of the Fire Department to perform its duties, people in the community want to receive such information. The public had an interest in hearing the content of Moore's speech.

The First Amendment's freedom of speech clause protects such speech. Freedom of speech presupposes both a willing speaker and a willing listener. A listener's interest enjoys protection just as the speaker's interest finds refuge behind the shield of the First Amendment. The Supreme Court's jurisprudence well supports this understanding of the First Amendment. See *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57, 96 S.Ct. 1817, 1822-1823, 48 L.Ed.2d 346 (1976) (citizens have a right to receive advertising information); *Kleindienst v. Mandel*, 408 U.S. 753, 758, 762-65, 92 S.Ct. 2576, 2579, 2581-83, 33 L.Ed.2d 683 (1972) (citizens' right to hear alien's speech); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386, 89 S.Ct. 1794, 1804, 23 L.Ed.2d 371 (1969) (purpose of First Amendment is to preserve an uninhibited marketplace of ideas in which truth ultimately will prevail; thus, the public must be able to hear the ideas and experiences to be able to

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(Continued from previous page)

and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Rankin* at 107 S.Ct. 2898 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 720, 11 L.Ed.2d 686 (1964)); cf. *Terrell v. University of Texas System Police*, 792 F.2d 1360, 1362-63 (5th Cir. 1986) (case preceding *Rankin* which involved speech contained in a private diary, in which the speaker "made no effort to communicate the contents of the notebook to the public" (emphasis added)). The speech in our case is not linked to a personal employment dispute between Moore and the City. See *Terrell*, 792 F.2d at 1363.



participate); *Thomas v. Collins*, 323 U.S. 516, 534, 65 S.Ct. 315, 324, 89 L.Ed. 430 (1945) (right of workers to hear what labor organizer had to say abridged by state law requiring organizers to register before soliciting union membership); *Martin v. City of Struthers*, 319 U.S. 141, 143, 63 S.Ct. 862, 863, 87 L.Ed. 1313 (1943) (freedom of speech necessarily protects the right of citizens to receive information); see also *Browner v. City of Richardson, Texas*, 855 F.2d 187, 191-92 (5th Cir.1988) (allegations of police misconduct constitute matter of public concern).

While our analysis is grounded in significant part on the importance to the public of the content of Moore's speech, Moore, as a citizen, also has a significant interest in speaking his mind on matters of public concern that factors importantly into our analysis. The First Amendment accords all of us, as participants in a democratic process, room to speak about public issues. The operation of the city Fire Department certainly is a matter that concerns interested citizens. When Moore spoke about the fire on December 26, 1985, he spoke as an informed citizen regarding a matter of great public concern. Thus, the content of Moore's speech concerns a matter of public concern.

We now turn to our context analysis. The district court stated:

the need for public debate on the staffing issue had passed. The City Commission had chosen their policy and implemented the same as of October 1, 1985; three months before Moore's comments. Moore had opposed the action publicly on behalf of the Association, but his proposed course was not the one followed. The issue, as of December 26, was moot. Using this



misfortune as the first opportunity to rehash this issue does not directly address matters of public concern, but rather smacks of a disgruntled employee attempting to draw public attention to this job-related issue.

The district court misses the point. The judiciary cannot declare the issue "moot." Although a particular incident may have passed into history, the caldron of ideas, implicating the incident may continue to boil. The underlying philosophical, political and social issues do not evaporate because of an *ex post* judicial declaration of "mootness."

The media in this case approached Moore, asked him for his comments, and printed his responses. The caldron was still simmering concerning the issue. While many cases touching the First Amendment may not receive media coverage, our case is even simpler. Here the pot was still bubbling; because the public was receptive and eager to hear about the ability of the Fire Department to perform its duties. Just because three months had passed since the budget cuts had been made, then, did not make the issue "moot." In a representative government, decisions often are not "final." Public pressure can mount, citizens can vote new people into power, and decisions can change. The power of public speech is its ability to influence, often in unseen ways, and protect our democratic form of government. Thus, our analysis of the context in which Moore's speech was uttered also leads us to conclude that his speech involves a matter of public concern.

Finally, we turn to an analysis of the form of Moore's comments. They do involve a hint of personal

"employee"<sup>3</sup> considerations ("I just want to say, 'I told you so.' "). However, mixed motivations are involved in most actions we perform everyday; we will not hold Moore to herculean standards of purity of thought and speech, ever assuming Moore's motivations were mixed. Taking Moore's speech as a whole, and considering the content, context, and form together, we hold that Moore's speech does involve a matter of public concern – the effectiveness of the Fire Department in fighting fires.

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<sup>3</sup> The Supreme Court also summarizes this "matter of public concern" inquiry in the conclusory terms of whether an employee is speaking as an "employee" versus as a "citizen." Specifically, the Court in *Connick v. Myers* stated:

"We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. [citation omitted] Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government. . . ."

*Connick v. Myers*, 461 U.S. 138, 147, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983). We have accomplished this inquiry by examining the content, context and form of Moore's speech. We have not, however, used the labels "employee" and "citizen" because as an analytical matter, these labels can be misleading. Confusion in analysis can result because such an inquiry may cause us to lose sight of the inherent public-natured content of speech which in the context may appear to relate to an ongoing employee matter. Therefore, for the sake of clarity, we have examined the content, context, and form of Moore's speech to determine whether he spoke as an employee or as a citizen. We conclude that Moore spoke as a "citizen."

### B. *Pickering/Connick Balance*

Because Moore's speech addresses a matter of public concern, we proceed to the second step of our *Pickering/Connick* inquiry. *Pickering* requires that we determine whether the interest of the employer "in promoting the efficiency of the public services it performs through its employees" outweighs Moore's and the public's interest in his speech that addresses a matter of public concern. See *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968). The City bears the burden of producing evidence which shows its interest in disciplining Moore for his speech. *Rankin v. McPherson*, 483 U.S. 378, 107 S.Ct. 2891, 2892, 97 L.Ed.2d 315 (1987); *Connick v. Myers*, 461 U.S. 138, 150, 103 S.Ct. 1684, 1691-1692, 75 L.Ed.2d 708 (1983). The strength of the "city interest" that the City must demonstrate depends on the strength of the "speech interest" in the scale's other pan. In *Connick*, the Supreme Court corrected a district court that misapprehended this balancing process. The Supreme Court stated:

The District Court viewed the issue of whether Myers' speech was upon a matter of "public concern" as a threshold inquiry, after which it became the government's burden to "clearly demonstrate" that the speech involved "substantially interfered" with official responsibilities. Yet *Pickering* unmistakably states, and respondent agrees, that the State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression. Although such particularized balancing is difficult, the courts must reach the most appropriate possible balance of the competing interests.

*Connick*, 461 U.S. at 150, 103 S.Ct. at 1691. Naturally, we will not consider either side's interest in a vacuum. The "manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose." *Rankin v. McPherson*, 483 U.S. 378, 107 S.Ct. 2891, 2898, 97 L.Ed.2d 315 (1987).

### 1. Interest in Moore's Speech

On the freedom of expression side of the balance, both Moore and the public have a strong interest in Moore's speech. The effectiveness of Fire Department services concerns the people of the City of Kilgore. Moore's informed speech provides the public with valuable information that is otherwise difficult to obtain unless an informed person speaks out. Moore also has a significant interest in speaking on this issue. Dissemination of information throughout the community may bring the community's suasion to bear on the issue of the effectiveness of the Fire Department. *See Pickering v. Board of Education*, 391 U.S. 563, 572, 88 S.Ct. 1731, 1736, 20 L.Ed.2d 811 (1968) ("Teachers are, as a class, the members of the community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent [a matter of public concern.] Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal"). A speaker hopes that his or her speech will set afire the political conscience of the community. As an informed citizen, Moore's comments and insights constituted powerful knowledge concerning the effectiveness of the public entity, the Fire Department. In the long

term, his speech is likely to help produce a fire department that is increasingly responsive to the needs of the citizenry.

The timing of Moore's speech certainly tilts in favor of the public nature of the speech; the speech occurred in response to two firefighters receiving injuries, one fatally, while fighting a fire. As to the manner, a portion of the speech was a bit acidic ("I told you so"). But the speech as a whole was directed more to the fire and the department's staffing than it was to Moore's past discussions with the City. The speech arose in the midst of a continuing dispute concerning the ability of the Fire Department to fight fires effectively. Moore hoped to spark a roaring and robust public debate concerning the issue. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 720, 11 L.Ed.2d 686 (1964) ("[D]ebate on public issues should be uninhibited, robust, and wide-open").

Thus, the interests of both Moore and the citizens of Kilgore in Moore's speech are extremely significant. Moore's speech does not merely touch upon matters of public concern in a marginal manner. His speech, considered as a whole, dwells at the center of the First Amendment, unlike in *Connick v. Myers*, 461 U.S. at 150, 154, 103 S.Ct. at 1691, 1693, (1983), in which the employee's questionnaire distributed to coworkers touched upon matters of public concern only in a more limited sense.

## 2. City's Interest in Effective Fire Department Services

The other side of the *Pickering/Connick* balancing test focuses on the City's interest in effective governance. To evaluate this element, we must examine the City's justification for taking disciplinary action against Moore in relation to the City's legitimate interest in the effective functioning of the public employer's enterprise. *Rankin v. McPherson*, 483 U.S. 378, 107 S.Ct. 2891, 2898-99, 97 L.Ed.2d 315 (1987); *Connick v. Myers*, 461 U.S. 138, 150, 103 S.Ct. 1684, 1691, 75 L.Ed.2d 708 (1983). Our inquiry focuses on the "effective functioning of the public employer's enterprise. Interference with work, personnel relationships, or the speaker's job performance can detract from the public employer's function; avoiding such interference can be a strong [city] interest." *Rankin v. McPherson*, 107 S.Ct. at 2899.

In evaluating whether the City has met its burden of justifying its action, we consider the *Rankin* Court's summary of several pertinent considerations:

whether the statement impairs discipline by superiors or harmony among coworkers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise.

*Rankin v. McPherson*, 483 U.S. 438, 107 S.Ct. 2891, 2899, 97 S.Ct. 315 (1987).

The City offers three reasons – insubordination, impaired arson prosecution, and a desire to disseminate accurate information – to justify its action in disciplining



Moore for his speech. We will discuss each City interest in turn.

The first offered reason, insubordination, requires some explanation. From Ron Cox's viewpoint as the City Manager, Cox believed that he and Moore had reached an agreement during a meeting in Cox's office on December 26, 1985 held at approximately 3:00 p.m. Cox believed Moore breached their agreement when Moore spoke on matters beyond an expression of condolence for the families of the deceased and the injured firefighters. In the disciplinary memorandum that Cox presented to Moore during the December 31, 1985 disciplinary meeting, Cox wrote,

You have misrepresented to me your intentions. You had stated you would say no more than what we had discussed and agreed upon, and proceeded to discuss with the media what you considered the facts to be regarding the fire. This, again, is insubordination. For your information, insubordination is defined in the dictionary as "not being subordinate or obedient." To be subordinate is to be "subject or subservient to another." It is our responsibility and duty as employees to be subject to the rules and regulations of the City.

Mr. Moore, you are an employee of this City. You are not expected to agree with every policy or every directive that is given to you, but you are expected to follow them. You have been supplied with a copy of the Fire Department Rules and Regulations and are expected to know what those rules and regulations are. In addition, you were directed verbally to refrain from any discussion of the events surrounding the fire. This flagrant insubordination cannot and



will not be tolerated. As a result, disciplinary action must be taken.

Cox disciplined Moore for what Cox ostensibly viewed as insubordinate speech. Mr. Cox also had transcribed the disciplinary meeting on December 31, 1985 during which Cox presented Moore with the memorandum quoted in part above. During the disciplinary meeting, Cox said, "If your personal opinion is contrary to [the City's] policies, then you've got two choices, Gary, you can work within those policies and work internally with in proper channels to express your opinions and to possibly get those changed. If that is needed. If they're not changed and if you continue to be dissatisfied, you can leave." [Plaintiff's exhibit 3, page 6).

For the City Fire Department to function efficiently, discipline and respect for management authority are important to the City. The City does have a legitimate interest in promoting a well-ordered fire department. But discipline for more abstract and attenuated management purposes that do not directly relate to the actual fighting of fires – the primary responsibility of the Fire Department – is an interest of lesser magnitude than discipline that relates directly to the business of fighting fires. The City presented no evidence that Moore's insubordinate statement interfered in any way with the actual fighting of fires.

A fire department should be a disciplined, well-oiled unit of firefighters because when firefighters arrive on the scene of a blazing, dangerous fire, the members of the unit must work together in an effective manner to protect the lives of the citizens and themselves and to extinguish the fire as soon as possible. Discipline directed towards the

*goal of fighting a fire effectively* is the backbone of a high quality fire department.

The type of discipline that the City imposed upon Moore is different. It concerns the City government as a whole organization and Moore as a city employee. In this situation, the concentration of discipline necessary to regulate employee behavior is significantly more diffuse. Some degree of discipline is desirable but strict, marine-like control is not necessarily appropriate to the running of a city as an organization.<sup>4</sup>

The key fact in this case is not that Moore is a firefighter; rather, it is that Moore is a city employee. Cox, the City Manager, attempted to maintain control over the City's employees by rendering them "obedient" and "subservient." If Moore had been a typist in the Fire Department, presumably Cox would have required the same degree of discipline and loyalty. As we stated before, the City has a legitimate interest in maintaining a disciplined force of City employees. But that interest is of lesser weight than the interest in discipline needed within the Fire Department itself, discipline that allows the members of the department to act as an effective fire-fighting unit when the moment arrives.

Cox's view, that Moore as a public employee could either function within the no speech rules or Moore could leave, was unchallenged dogma for a large part of this

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<sup>4</sup> Cf. *Bickel v. Burkhart*, 632 F.2d 1251, 1257 (5th Cir.1980) ("where a fireman, motivated by resentment, bitterness and self-aggrandizement engages in disruptive conduct intending to undermine the authority of department officers, the speech accompanying such conduct is not constitutionally protected").

century. Justice Holmes, then sitting on the Massachusetts Supreme Judicial Court, stated it best when he wrote "[A policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, 518 (1892); see *Connick v. Myers*, 461 U.S. 138, 143-44, 103 S.Ct. 1684, 1688, 75 L.Ed.2d 708 (1983).

An employee does not abandon his or her First Amendment rights when the employee agrees to work for a public entity. This balancing methodology that we utilize is meant to protect the employee's speech regarding matters of public concern without overburdening the public employer's ability to function effectively in its assigned tasks. Creating room for free speech in a hierarchical organization necessarily involves inconveniencing the employer to some degree. Speech concerning public affairs usually creates attendant inefficiencies in the running of the public entity. But efficiency is not an end-all and be-all goal of a democracy. Speech among the people helps to maintain the vitality of self-government. See *Connick v. Myers*, 461 U.S. 138, 145, 103 S.Ct. 1684, 1689, 75 L.Ed.2d 708 (1983). For as Sir Winston Churchill stated:

Many forms of government have been tried, and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time.

Address by Sir Winston Churchill, House of Commons (Nov. 11, 1947), reprinted in *The Oxford Dictionary of Quotations* 150 (3d ed. 1979).

Moore's speech, which Cox views as insubordinate, does burden the efficient operation of the City as an organization. However, keeping in mind that Moore's speech does not hinder the ability of the Fire Department to perform its primary task – fighting fires – we find that the City's burden due to insubordination is minimal. In addition, the City presented no evidence, other than Cox's views, that Moore's arguable insubordination disrupted the work of the City. *See Rankin*, 107 S.Ct. at 2899.

The second interest the City relies upon to balance out the weighty interest in Moore's speech focuses upon arson. Cox summarized how Moore's speech affected the City's interest concerning an arson investigation. The portion of Moore's speech that concerned Cox was:

This was just an *ordinary structure fire*. . . . What's going to happen when something major happens? We're dealing with shortage of manpower. It may not have made a difference in B.J. Hawthorne's heart attack. We really don't know. But there was no doubt that it contributed to Capt. Jackson's injury.

Then during direct examination of Cox, Cox stated,

I think a defense lawyer on behalf of that individual who's charged with that would use Mr. Moore's statement as an authoritative statement, someone on behalf of the City of Kilgore in some manner, as being one of fact that it wasn't arson, it was ordinary, and would have a tendency to bias those people making a decision, whether it be a Jury or a Judge . . . with regard to his contention that there's a manpower shortage, I would think that, if I were a defense lawyer, I would be trying to mold the Jury's mind to believe that the house was not destroyed by the arson alone, but by virtue of

the fact that the City did not have enough people to handle the fire itself.

Tr. at 54-55.

The City has an interest in promoting its ability to prosecute an arson case. Any damage Moore's "ordinary structure fire" comment could inflict upon a potential arson prosecution by the City would be very minimal. In regard to the phrase "ordinary structure fire." Moore's explanation of his usage could certainly be brought out by the prosecutor in an arson case to rebut whatever defense inference was available. Moore stated, on direct examination in this case, "What I'm referring to as an ordinary structure fire was that this was not a plant or a major structure of any kind. It was a medium size house. It was not an oil related fire. It was just, as far as I'm concerned, as ordinary structure fire, which would be an ordinary house fire."

As to Moore's manpower shortage comment, this comment could slightly affect an arson prosecution, but such an interference would be insubstantial. Any arson prosecution will be won or lost on the physical evidence (presence of an incendiary agent, damage to the structure as evidence of the cause of the fire, and motive and opportunities of the suspect). Moore's comment concerning the shortage of firefighters would not substantially interfere with the City's prosecution of an arson suspect. The City's interest in a potential arson prosecution is a flicker of a candle's flame compared with the radiating incandescence of Moore's speech.

The third interest the City asserts as legitimate is its desire to control the flow of information so that the City

can ensure that speakers disseminate only "accurate" information. Cox stated on recross-examination that "all of the statements [by Moore] were important, because of the impact they have on the public's perception of what happened; . . . [if] it turned out that Mr. Moore didn't have the facts and if we're going to be quoted, we need to be accurate." (Tr. at 73).

Two considerations militate against the City's third proffered interest. The first is a consideration of timing. The second consideration concerns the interplay between the content of Moore's speech and the City's burden of proof.

The City's interest in an "accurate" flow of information is not absolute and does not enjoy durational eternity. Before Moore spoke the City held a press conference concerning the fire at which the City had ample opportunity to express its official view of the fire. In this case, the City's press conference occurred the next morning, December 27, 1985, after the fire. Moore's different angle on the same occurrence is precisely what encompasses the thrust of the public's interest in Moore's speech. Thus, any legitimate government interest in controlling the flow of accurate information dissipates after the public entity has had an opportunity to present its view, an opportunity that the City utilized in this case.

As to the second point, that the City viewed some of Moore's comments as misstatements, the *New York Times Co. v. Sullivan* standard applies. *Pickering v. Board of Education*, 391 U.S. 563, 572-74, 88 S.Ct. 1731, 1736-1737, 20 L.Ed.2d 811 (1968); see generally *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).



Before the City's interest in the accurate dissemination of information may carry *any* weight in the *Pickering/Connick* balance, the City must prove that Moore made false statements of fact with either knowledge of their falsity or with reckless disregard of their truth or falsity. *Pickering*, 391 U.S. at 573-74, 88 S.Ct. at 1737. The City made no such showing in this case. It introduced no evidence that even begins to approach the *New York Times* standard. Thus, we accord no weight under the *Pickering/Connick* balancing test to the City's proffered interest in the control of the flow of information following the fire.

### 3. Balancing the Interests

We have examined the interests of the public and Moore in Moore's speech, which addressed matters of public concern. Moore's speech is of significant importance concerning the people's ability to govern themselves in the City of Kilgore, Texas. Now we must decide whether the City's three asserted interests, as a whole, outweigh the great magnitude of the interests of both Moore and the public in Moore's speech. The insubordination interest, in regard to the City as an entity, burdens the efficient operation of the City as an organization, but the burden is minimal. The interest concerning the City's ability to prosecute an arson case also has merit, but it does not approach a level of substantiality by itself that significantly affects our inquiry. The third proffered interest - the desire to control the flow of information - has no weight in this case. Combining the City's interests concerning insubordination and arson, we find that the side of the scales containing the interest in Moore's speech is firmly planted on the



ground while the City's two interests dangle high above. The *Pickering/Connick* balancing test weighs heavily in Moore's favor.

The City does not dispute that it disciplined Moore based on the content of his speech. (Appellee's brief at 7). Thus, we conclude that Moore was disciplined for expressing constitutionally protected speech in contravention of his First Amendment freedom of speech rights. We reverse the judgment of the district court on this issue. The district court, because of its holding, did not have to reach the issue of appropriate relief. Thus, we remand the case to the district court for a trial on the issue of appropriate relief. We intimate no view concerning what the correct measure of damages, beyond nominal damages, would be in this case. See *Memphis Community School District v. Stachura*, 477 U.S. 299, 106 S.Ct. 2537, 2544-46, 91 L.Ed.2d 249 (1986); *Carey v. Phipps*, 435 U.S. 247, 254-59, 98 S.Ct. 1042, 1047-1050, 55 L.Ed.2d 252 (1978).

## II. Facial Validity of Kilgore Fire Rule 4.2A(40)

In our resolution of this case, we encounter a wicked wicket, which engagement we enter into with some trepidation. It is at this wicket that I must now part company with my brethren. As I do so, I am aware that the croquet balls of constitutional adjudication can be quite heavy, therefore, I shall try to use a light mallet to prevent the balls from leaving our grassy court.

In addition to his claim that the City of Kilgore Fire Department Speech Rule 4.2A(40) was unconstitutionally applied to him, Moore contends that the Rule is facially invalid. Moore asked the district court to enjoin the use of

the Rule in his complaint, when in his prayer for relief, he included requests for "preliminary and permanent injunctions . . . prohibiting enforcement of Kilgore Fire Department Regulation 4.2A(40)[.]" If the district court had granted Moore the requested relief, could ever be restrained or punished for disobeying the Rule because the Rule would be void. The district court ruled against Moore on this issue of facial invalidity, and the district court's ruling is affirmed by Judge Higginbotham's opinion for the majority.

The majority offers alternative holdings for its conclusion: first, that Moore has not properly presented his facial attack on the Rule for appellate review; and second, that assuming the issue is properly presented, that Moore, because he prevailed upon his claim that the Rule was unconstitutionally applied to him, does not have standing to assert a facial challenge to the Rule. Instead, the majority believes that Moore has "footed his facial challenge to the Fire Department Rule entirely upon grounds of overbreadth" as the Rule applies to "him - the plaintiff who is before us." The majority then concludes that in such a situation, it is inappropriate for a court to entertain a facial challenge based on overbreadth.

The majority errs for two reasons. First, I believe Moore has properly presented the issue of the facial invalidity for our consideration. Second, we should strike down the Rule as a prior restraint which is invalid in every application.

The issues that lie before us are complicated and, at times, wind around one another. Therefore I provide a

roadmap – although perhaps one not equivalent in topographical precision to a Rand McNally version – which should be helpful for the jalopy driver and Indianapolis racer alike. First, I discuss the presentment issue. Second, I examine the underlying values embodied in the First Amendment (truth, knowledge, and tolerance). Third, I unwind the three threads of First Amendment jurisprudence contained in the district court's opinion and Moore's appeal (generic overbreadth, substantial overbreadth doctrine, and prior restraints). Finally, I consider the Kilgore Rule in light of all the foregoing considerations. The framework of analysis by which I consider the Kilgore case is close to outcome determinative. This observation is only true because, after examining the entangled threads of First Amendment jurisprudence in light of the framework surrounding the Kilgore Rule, it becomes apparent that the Kilgore Rule constitutes an unconstitutional prior restraint. The majority commits a pivotal error when it treats this prior restraint as an after-the-fact sanction. From this single, threshold mistake flows the body of my disagreement with the majority.

*A. Presentment of the Issue of Facial Validity*

Concerning the facial invalidity of the Rule, the majority finds that Moore has presented to this Court only one argument: that the Rule is invalid because of the overbreadth doctrine. As a consequence, the majority does not believe that Moore has presented an argument that the Rule is a prior restraint. Moore's briefs are not

extensive concerning the facial invalidity of the Rule.<sup>5</sup> However, Moore has properly presented the issue of whether this Rule is an unconstitutional prior restraint at a sufficient level of generality to put the City on notice of the argument. Moore refers to the problems inherent in a prior restraint when he discusses the city's discretion and the muzzling effect of the Rule. Moore also generally attacks the district court's decision, which, I should add, also considers the Rule with respect to its prior restraint feature.

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<sup>5</sup> Moore's Original Appellate Brief states: "Rule 3.2a(40) (sic) of the Kilgore Fire Department's Rules and Regulations is unconstitutional for overbreadth, both on its face and as applied.

The rule under which plaintiff was disciplined and under which plaintiff continues to work directs fire department employees to 'refrain from furnishing information relative to department policy, practice or business affairs *except as authorized by the chief of the department.*' (R.E. 22).

The rule is directed only to speech activities. It makes no distinction between information furnished by an employee as a citizen exercising First Amendment rights and information furnished in the role of an employee. *The rule contains no guidelines for the exercise of the chief's discretion in deciding what speech to authorize.*

*The City of Kilgore gives the rule its broadest interpretation in its application to plaintiff. He is and has been denied authorization to make any public statements concerning city business. The memo disciplining plaintiff states: 'Conclusion Mr. Moore, I remind you again that you are an employee of this City. There will be no more public announcements by you regarding your opinion of any policies or directives issued by this City. Each employee*

(Continued on following page)

As I will discuss in Part II-C *infra*, confusion necessarily results from the linguistic overlap of the generic,

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(Continued from previous page)

has the choice of working for this City, or leaving to find other employment, should he disagree with the policies and practices . . . ' (emphasis added). (R.E. 22).

Similar rules prohibiting 'unauthorized' speech by public employees were found to be in violation of the First Amendment by the Fifth Circuit in *Barrett v. Thomas*, 649 F.2d 1193, 1199 (5th Cir.1981), *cert. denied* 456 U.S. 925, & 456 U.S. 936, 102 S.Ct. 1969, 102 S.Ct. 1992, 72 L.Ed.2d 440, 72 L.Ed. 455 (sic). There is nothing to distinguish Kilgore's rule from the same verdict, particularly as it has been applied to plaintiff to *prohibit all public statements by him.*"

Moore's Reply Brief states: "Plaintiff was disciplined pursuant to and continues subject to a rule which is unconstitutionally overbroad on its face.

Despite defendant's bold declaration to the contrary, the challenged Fire Department rule does indeed 'make freedom of expression its substantial target.' *Janusaitis v. Middlebury Volunteer Fire Department*, 607 F.2d 17, 28 (2d Cir. 1979). The only target of the rule, unlike many cited by defendant, is the dissemination (sic) of 'information relative to department policy, practice or business affairs.' The only exception made is such information as is authorized by the fire chief or department. *The city manager, relying on this rule, in disciplining plaintiff, instructed plaintiff that this prohibition includes any public announcements by Mr. Moore of his opinion of any policies or directives issued by the city.* R.E. 22. While clearly a city may have comprehensive, even broad, rules and regulations prohibiting or regulating the conduct, including the speech, of employees which could be harmful to the legitimate ends of the governmental entity, *rules as overbroad as this*, should not be allowed to *form the basis for a muzzle on an employees' involvement in legitimate public discussion of issues in which that employee may be particularly interested or informed.*" (emphasis added).

descriptive use of the term "overbroad" with the First Amendment Doctrine of "substantial overbreadth."<sup>6</sup> The district court's use of the word "overbroad" is ambiguous regarding whether the court used the term in its generic sense, specific doctrinal sense, or both senses. Presented with an entangled area of constitutional jurisprudence, Moore probably has attacked the district court's disposition in a less than analytically ideal manner. Given the confusing nature of these jurisprudentially tangled threads of analysis, however, which I shall discuss more fully *infra*, I cannot agree with the majority that Moore's alleged error in analytical precision should foreclose this court from reviewing the district court's decision concerning the facial validity of the Rule.

In my view, because of the complexities of this area, common law-like assignments of error are not necessary for an issue to be properly presented to the appellate court. Moore has attacked the Rule on its face, requesting specific injunctive relief in the process concerning the facial status of the Rule. The use of the ambiguous term "overbroad,"<sup>7</sup> which Moore appears to have used in its generic, descriptive mode, coupled with discussion in his briefs that the "rule contains no guidelines for the exercise of the chief's discretion in deciding what speech to authorize," and that Moore "is and has been denied

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<sup>6</sup> See *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 104 S.Ct. 2839, 2851-52 n. 13, 81 L.Ed.2d 786 (1984).

<sup>7</sup> See *Secretary of State of Maryland v. Joseph H. Munson Co.*, 567 U.S. 947, 104 S.Ct. 2839, 2851-52 n. 13, 81 L.Ed.2d 786 (1984) (explaining ambiguous use of the words overbroad and overbreadth).



authorization to make any public statements concerning city business (including future statements of any sort)," should be enough to present the entangled problems of: (a) a prior restraint; (b) the legal doctrine of substantial overbreadth; and (c) the descriptive notion of a [sic] overbroad rule. I believe we are fully entitled to consider all relevant issues in Moore's case as they may relate to the district court's judgment that the Rule is facially constitutional. A prior restraint, enshrined in a written rule, should not live on because able advocacy becomes imperfect as a result of judicial and jurisprudential confusion.

#### *B. Values Which the First Amendment Embodies*

As a method of adjudication, invalidating an entire rule as facially unconstitutional is certainly "strong medicine." See *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 2916, 37 L.Ed.2d 830 (1973) (attacking statute on its face using doctrine of substantial overbreadth). A court which utilizes such medicine should consider the patient's ailment and risks of the medicine carefully before administering the dosage. However, when the ailment appears to be fatal, strong medicine may be the best prescription for the patient. The health of the patient - freedom of speech - should be a court's primary focus.

Both action and restraint by a court integrally affect First Amendment values. Failure to administer strong medicine when it is called for may undermine First Amendment values just as legitimately striking down a rule will nourish those same values. Thus, in examining the legal doctrines which criss-cross the First Amendment, it is important to keep one's eye always on the



underlying reasons for freedom of speech so that the doctrines are not rent from their foundations.

Traditionally, "free speech is protected because it has values; it springs from the age of enlightenment out of which the spirit of the American Revolution came. The values include truth-seeking and knowledge-advancement, as a societal object, as well as to a lesser degree perhaps, self-fulfillment on the part of the individual speaker [autonomy and individual dignity]". *Oakes, Tolerance Theory and the First Amendment*, 85 Mich.L.Rev. 1135, 1137 (1987).

Citizens in a democracy need to hear about problems that their government encounters. To assist people in making informed decisions, information must be made public for citizen deliberation. Purely "political" words are not the only words of truth and knowledge that the public needs or desires to hear. What is personal for one person is political for another. Thus, for the people to be able to judge for themselves the value or usefulness of particular speech, the people need to hear the actual words as spoken by the speaker, unfiltered and unabashed. Censorship spawns two great evils: distortion through the filtering of speech to conform with the censor's vision of truth and knowledge, and the chilling of potential speakers, especially the timorous who self-restrain valuable words from flowing with slight pressure from external sources.

In addition, there is also "a crucial social role for the free speech principle in the contest of the assumed reality of an impulse to intolerance." L. Bollinger, *The Tolerant Society: Free Speech and Extremist Speech in America* 106

(1986). Free speech provides "a method of addressing a [sic] ubiquitous social incapacity, [the incapacity within all of us of intolerance]." Bollinger at 107; see Oakes at 1139.

Speech that an official deems worthy of suppression commonly tends to criticize the official or the governmental body in some way. Humans dislike self-directed criticism. The intolerance within all of us can oversuppress speech which is otherwise useful either to the speaker or to a listener. The desire to suppress unpleasant or critical speech is almost irrepressible. As a society, and as a judicial body within our society, we should attempt where legitimately possible to encourage self-restraint rather than intolerance in regard to speech. See L. Bollinger, *The Tolerant Society: Free Speech and Extremist Speech in America*, 243-45 (1986).

Professor Bollinger sees free speech as "stand[ing] symbolically as the gateway to social intercourse." *Id.* at 238. "American society has evolved with this principle according to Bollinger because it is a capitalist economic society, with pervasive bureaucratic and professional systems, where personal preferences tend to be submerged; because it is composed of large immigrant groups of many different cultures and religions; because it is stable with a relatively homogeneous two-party system not likely to be supplanted by splinter, deviant groups. The First Amendment has taken on meaning, he again reminds us, beyond merely preserving meritorious speech or preserving an area of freedom for each individual beyond the reach of the State, a meaning which can be seen in the context of extremist speech cases. The meaning is that free speech principles enable us to see the elements in our thinking that distort our judgment in

drawing the lines that inevitably have to be drawn in a pluralistic society. Free speech is thus a means, as well as an end." Oakes, *Tolerance Theory and the First Amendment*, 85 Mich.L.Rev. 1135, 1143-44 (1987).

Fostering tolerance, one hopes, also renders the impulse to intolerance less attractive in other, nonspeech areas. Tolerance of speech has the effect of spilling over into other areas of our pluralistic society, encouraging tolerance between people concerning the differences among us.

C. *Three Threads of First Amendment Jurisprudence: Generic Overbreadth, Substantial Overbreadth Doctrine, and Prior Restraints.*

In one, short paragraph,<sup>8</sup> the district court's analysis of Moore's facial challenge to the Rule interweaves three different yet interrelated threads of First Amendment jurisprudence. The district court's language – "[t]he rule on its face does not sweep beyond the constitutional barrier" – evidences one thread which encompasses the

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<sup>8</sup> The district court's opinion reads: "Nor is the evidence from this case sufficient to strike down the regulation in question as facially – always and however applied – invalid. *The regulation requires clearance through department channels before releasing information* 'relative to department policy practices, or business affairs.' For a variety of reasons, including safety and security, this is an area of legitimate government interest to control, or at least monitor, statements made by employees on possibly confidential or sensitive matters to prevent indiscrete disclosures. The rule on its face does not sweep beyond the constitutional barrier." (emphasis added).

descriptive, generic use of the word "overbroad" to mean something which stretches too far: in other words, a statute that is not narrowly tailored. A second thread, found in the district court's conclusion of law flowing from the one paragraph discussion, reads: "Rule 4.2A(40) is not facially unconstitutional for overbreadth." The district court possibly used the word "overbroad" to mean the doctrine of substantial overbreadth, which is sometimes viewed as a third party standing notion. See *Broadrick v. Oklahoma*, 413 U.S. 601 93 S.Ct. 2908, 2916, 37 L.Ed.2d 830 (1973). A third thread invokes the whole substantive area of prior restraints as evidenced by the district court's words "[t]he regulation requires clearance through department channels before releasing information. . . ."

#### 1. Generic "Overbreadth" Versus "Substantial Overbreadth" Doctrine

Because of the linguistic overlap between thread one and thread two,<sup>9</sup> the district court's use of word "overbroad" introduces an ambiguity into the district court's opinion. One may read the opinion to be discussing either thread one – generic use of the word overbroad – or thread two – the legal doctrine of substantial overbreadth – or both notions. In *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 962, 104 S.Ct. 2839, 2851-52 n. 13, 81 L.Ed.2d 786 (1984), the Supreme Court discussed this sort of ambiguous use of the word "overbroad":

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<sup>9</sup> See *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 104 S.Ct. 2839, 2851-52 n. 13, 81 L.Ed.2d 786 (1984).

The dissenters appear to overlook the fact "overbreadth" is not used only to describe the doctrine that allows a litigant whose conduct is unprotected to assert the rights of third parties to challenge a statute, even though "as applied" to him the statute would be constitutional. E.g. *New York v. Ferber*, [458 U.S. 747, 768 n. 21, 102 S.Ct. 3348, 3360, 73 L.Ed.2d 1113 (1982)]. "Overbreadth" has also been used to describe a challenge to a statute that in all its applications directly restricts protected First Amendment activity and does not employ means narrowly tailored to serve a compelling governmental interest. [citations omitted; cf. *City Council of Los Angeles v. Taxpayers For Vincent*, [466 U.S. 789, 797, 104 S.Ct. 2118, 2124, 80 L.Ed.2d 772 (1984)] (recognizing the validity of a facial challenge but suggesting that it should not be called 'overbreadth') [citations omitted].

Thus, the Supreme Court in *Munson* recognizes that the words overbroad and overbreadth have been confused but properly should be separated. In *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 797, 104 S.Ct. 2118, 2124, 80 L.Ed.2d 772 (1984), the Supreme Court articulates two quite different ways by which a court may declare a statute or rule facially invalid. The first reason, which has deep historical roots in constitutional adjudication, is because the statute "is unconstitutional in every conceivable application." *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 796, 104 S.Ct. 2118, 2124, 80 L.Ed.2d 772 (1984); See *City of Lakewood v. Plain Dealer Publishing Co.*, \_\_\_ U.S. \_\_\_, 108 S.Ct. 2138, 2143-45, 100 L.Ed.2d 771 (1988) (4-3 majority opinion; "facial challenge lies whenever a licensing law gives a government official or agency

substantial power to discriminate on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers"). The second reason for a court to strike down a statute on its face is because the statute "seeks to prohibit such a broad range of protected conduct that it is unconstitutionally 'overbroad.'" *Vincent*, 466 U.S. at 796, 104 S.Ct. at 2124. In *Vincent*, the Supreme Court also stated,

[t]he seminal cases in which the Court held state legislation unconstitutional 'on its face' did not involve any departure from the general rule that a litigant only has standing to vindicate his own constitutional rights. In *Stromberg v. California*, 283 U.S. 359, 75 L.Ed. 1117, 51 S.Ct. 532, 73 ALR 1484 (1931), and *Lovell v. Griffin*, 303 U.S. 444, 82 L.Ed. 949, 58 S.Ct. 666 (1938), the statutes were unconstitutional as applied to the defendant's conduct, but they were also unconstitutional on their face, because it was apparent, that any attempt to enforce such legislation would create an unacceptable risk of suppression of ideas. In cases of this character a holding of facial invalidity expresses the conclusion that the statute could never be applied in a valid manner.

*Vincent*, 466 U.S. at 797-98, 104 S.Ct. at 2124 (footnotes omitted); see *City of Lakewood*, 108 S.Ct. at 2145; *Pope v. Illinois*, 481 U.S. 497, 107 S.Ct. 1918, 1921, 95 L.Ed.2d 439 (1987).

The *Munson* court, after pointing out the ambiguous use of the word overbroad, went on to state that it "was on the basis of the latter failing [overbroad because in all applications a statute directly restricts protected First Amendment activity and does not serve a compelling governmental interest] that the Court in *Schaumburg* [*v.*



*Citizens for a Better Environment*, 444 U.S. 620, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980)] struck down the Village ordinance as unconstitutional. Whether that challenge should be called 'overbreadth' or simply a 'facial' challenge, the point is that there is no reason to limit challenges to case-by-case 'as applied' challenges when the statute on its face and therefore in all its applications falls short of constitutional demands." *Munson*, 104 S.Ct. at 2852 n. 13 (1984).

Under *Vincent*, *Munson* and the string of cases they rely upon, if a rule is unconstitutional in all its applications, a plaintiff may challenge the rule as unconstitutional on its face. Under the substantial overbreadth doctrine, a person whose speech may be prohibited constitutionally may nevertheless prevail upon a facial challenge if the statute covers too much speech, and the statute's provisions are unseverable. See *Broadrick v. Oklahoma*, 413 U.S. 601, 611-13, 93 S.Ct. 2908, 2915-17, 37 L.Ed.2d 830 (1973). The extra coverage is determined by examining what hypothetical speakers might say, and determining whether constitutionally protected speech is included within the coverage of the statute. Because one looks at the speech of hypothetical third parties, the substantial overbreadth doctrine is often considered to be a third party standing notion. See *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503, 105 S.Ct. 2794, 2801, 86 L.Ed.2d 394 (1985).

Others quit properly understand the "substantial overbreadth" doctrine in terms of first party standing. In first party terms, the doctrine is grounded on twin notions: that a "litigant's conduct may be regulated only in accordance with a valid rule" Monaghan, *Third Party*

*Standing*, 84 Colum.L.Rev. 277, 285 (1984); Monaghan, *Overbreadth*, 1981 Sup.Ct.Rev. 1; and if the rule applies to hypothetically protected areas of speech, the rule must be declared facially unconstitutional if the "permissible and impermissible parts of the statute are not severable." Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 244 (1988); *Broadrick v. Oklahoma*, 413 U.S. 601, 613-14, 93 S.Ct. 2908, 2916-17, 37 L.Ed.2d 830 (1973) (facial overbreadth not invoked when a limiting construction has been or could be placed on the challenged statute). Severability is the key to understanding the overbreadth doctrine in first party terms.<sup>10</sup> Cases in which a court decides that the statute or rule is unseverable involve, most typically, the decision that, given the nature and range of the act's invalidity, the lawmaker – federal, state, or local – would not want the severed statute to stand, or for federalist reasons, a federal court should not sever the statute. See Monaghan, *Overbreadth*, 1981 Sup.Ct.Rev. 1, 10-15.

## 2. Prior Restraints: Generically "Overbroad" Because Invalid in all Applications

A prior restraint is sometimes generically referred to as "overbroad" because there is no valid application of

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<sup>10</sup> In *Brockett v. Spokane Arcades, Inc.* 472 U.S. 491, 504, 105 S.Ct. 2794, 2802, 86 L.Ed.2d 394 (1985), the Supreme Court appears to create an anomolous exception to the substantial overbreadth doctrine by intimating that a person who prevails on an "as applied" challenge cannot attack the statute on its face as substantially overbroad. The passage obscures the point that substantial overbreadth is not a standing notion but, rather, a question of severability. Keeping one's eyes on the questions of severability will help to keep this confusing area of law well-ordered. See generally Monaghan, *Overbreadth*, 1981 Sup.Ct.Rev. 1.

the restraint. Such a conclusion prompts the question, what is a prior restraint? As I shall discuss in Part D(1) *infra*, the majority does not delve into the content of prior restraints, but relies instead on its attempted distinction between prior restraints and after-the-fact sanctions. The majority, however, fails to recognize that a sanction may or may not be a reflection of an unconstitutional prior restraint, and that a prior restraint is no less invalid because a speaker has ignored the government's unconstitutional command.

There are different types of sanctions with quite different consequences for a constitutional inquiry. The sanction which flows from a failure to receive prior clearance is a sanction which attempts to enforce a prior restraint. In contrast, the type of sanction which flows from the content of speaking forbidden words is in constitutional terms referred to as an after-the-fact (of speaking the forbidden words) sanction. An illustration may be helpful to delineate the differences I discuss. The ordinance in *Lovell v. Griffin*, 303 U.S. 444, 447, 58 S.Ct. 666, 667, 82 L.Ed. 949 (1938) stated:

Section 1. That the practice of distributing, either by hand or otherwise, circulars, handbooks, advertising, or literature of any kind . . . within the limits of the City of Griffin, without first obtaining written permission from the City Manager of the City of Griffin, such practice shall be deemed a nuisance, and punishable as an offense against the City of Griffin.

Ms. Alma Lovell did not seek permission to distribute her pamphlets or magazines because "she regarded herself as sent 'by Jehovah to do His work' and that such an application would have been 'an act of disobedience to His

Commandment.' " *Lovell* at 448, 58 S.Ct. at 667. She was found guilty of violating the above quoted statute and sanctioned accordingly.

The Supreme Court reversed her conviction because the ordinance was a prior restraint, void on its face. The character of the ordinance is "such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship. . . . While this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision. [citations omitted]. Legislation of this type of the ordinance in question would restore the system of license and censorship in its boldest form." *Lovell* as 451-52, 58 S.Ct. at 669. The "sanction" Ms. Lovell received was not an after-the-fact sanction. Ms. Lovell's receipt of a sanction did not change the character of the prior restraint into something else. Her punishment was a sanction flowing from an unconstitutional prior restraint.

To decide whether a rule is a prior restraint, one should examine the rule from the viewpoint of the speaker. Constitutional jurisprudence envisions two basic types of prior restraint. For the first type, one should ask, does the speaker have to obtain clearance or permission to speak? If so, then the rule constitutes the classic prior restraint - a restraint which subjects a speaker to a pre-clearance censor. See *Lovell v. Griffin*, 303 U.S. 444, 451-52, 58 S.Ct. 666, 668-69, 82 L.Ed. 949 (1938). There is also another kind of prior restraint: the injunction which has the effect of gagging a speaker. This second type of prior restraint, which does not encompass the entire scope of

prior restraints, is also treated as a prior restraint because of its effect. The type of prior restraint primarily involved in this case is the first type – a restraint which screens a speaker's speech before the words are spoken. As I discuss below in Part D(1), the sanction a speaker receives for disobeying the strictures of the system of censorship does not transform the restraint into a [sic] after-the-fact sanction.

As an example, imagine that the Kilgore Rule reads:

Refrain from furnishing information relative to department policy, practices, or business affairs.

The removal of the concluding phrase "except as authorized by the Chief of the Department" transforms this prior restraint into a total blackout of nearly all speech. This blanket prohibition, while it suffers from other constitutional infirmities,<sup>11</sup> would not be a prior restraint. No censor screens the proposed speech. *See also City of Lakewood v. Plain Dealer Publishing Co.*, \_\_\_ U.S. \_\_\_, 108 S.Ct. 2138, 2142, 100 L.Ed.2d 771 (1988) (newspaper had not yet placed its proposed racks on city sidewalks, but instead

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<sup>11</sup> Shutting off all speech is not constitutionally permissible. The First Amendment needs room to breathe. *See Airport Commissioners of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 107 S.Ct. 2568, 2572-73, 96 L.Ed.2d 500 (1987). And a broad, vague statute will not suffice because a vague rule invites prosecutorial abuse, and because the Due Process Clause protects a person from punishment when the person did not receive adequate notice of the proscribed conduct. *See Jews for Jesus*, 107 S.Ct. at 2573.

sought an order from the court enjoining the utilization of the ordinance before requesting a permit). If the City of Kilgore went to court and received an injunction to stop an employee from speaking at an upcoming event, then the injunction enforcing the rule would be the second type of prior restraint – the gagged speaker restraint. The success ratio of the government in restraining speech is not, however, a crucial distinction, only a mere reminder that prior restraints do succeed in preventing speech from flowing.

*Saia v. New York*, 334 U.S. 558, 558-60 68 S.Ct. 1148, 1148-50, 92 L.Ed. 1574 (1945), is another example of a screening type prior restraint. The speaker, a minister, was a Jehovah's Witness. The City of Lockport, New York, had an ordinance which forbade the use of sound amplification devices except with the permission of the Chief of Police. The speaker obtained permission to use sound trucks to amplify lectures on religious subjects. When this permit expired, the speaker "applied for another one but was refused on the grounds that complaints had been made." [The speaker] nevertheless used his equipment as planned on four occasions, but without a permit." *Saia* at 559, 68 S.Ct. at 1149. The speaker was tried and convicted for his violation of the ordinance.

The Supreme Court held the ordinance unconstitutional on its face because it established a prior "restraint on the right of free speech . . ." *Saia*, 334 U.S. at 560, 68 S.Ct. at 1149. "To use a loud-speaker or amplifier one has to get a permit from the Chief of Police." *Id.* The fact that one's speech is actually disseminated does not turn a prior restraint into an after-the-fact sanction.



The crucial examination focuses on what the speaker must do or cannot do as viewed from the speaker's viewpoint.<sup>12</sup> If the speaker must seek permission or review before speaking, then the system is a screening-type prior restraint. Of course, the fact that a rule is a prior restraint does not mean that the rule is per se unconstitutional. However, understanding how the rule functions is a very important threshold step for navigating the swirling water surrounding any discussion of the First Amendment.

#### *D. Kilgore's Prior Restraint – Invalid in All Applications*

In this case, several steps are involved in the constitutional inquiry. First, is Kilgore's Rule a prior restraint? I believe Kilgore's Rule is a prior restraint, and the majority incorrectly characterizes the Rule as an after-the-fact sanction in this case. Second, I will examine why this plaintiff should be able to challenge the Rule on its face. Finally, and most importantly, I will explain why this court is constitutionally compelled to consider this facial challenge: the Rule is invalid in all its applications. Thus, we should consider Moore's facial challenge, and we should find the Rule unconstitutional on its face.

#### 1. Is Kilgore's Rule a Prior Restraint?

Aware of – perhaps steeped in – the values guiding out First Amendment inquiry, and the framework of parallel threads that are all too often hopelessly tangled, one

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<sup>12</sup> See further discussion in Part D(1) for the difference between the internal viewpoint – examination conducted from inside the speaker's shoes – and the external viewpoint – looking from the outside at the effect of a rule.

may properly analyze the facial difficulties of Kilgore's Rule. The first step, in deciding whether Moore can attack facially the Rule and prevail, is to decide how the Rule operates. Is the Rule a prior restraint? Is the Rule an after-the-fact sanction as the phrase is understood constitutionally?

It is usually best at first to examine closely the content of the Rule in controversy. The Rule states:

Refrain from furnishing information relative to department policy, practices, or business affairs except as authorized by the Chief of the Department.

On its face, this Rule primarily operates a prior restraint. The word "refrain" directs a Kilgore firefighter not to speak. The content of the speech prohibition reaches to all information relative to department policy, practices, or business affairs – an extremely broad sweep concerning the type of speech involved. Consequently, a firefighter cannot speak about anything which touches upon the fire department's affairs. If a firefighter wants to speak to anyone – about, for example, a particular method of staffing a firehouse – the firefighter must go to the Chief with the proposed speech and receive the Chief's blessing – authorization – before the firefighter may utter a single syllable. The Rule gives the Chief the right not to authorize the proposed speech. Thus, the Chief can gag the firefighter before the words are spoken. No guidelines of any sort, except the scope of the content of the speech itself ("information relative to department policy, practices, or business affairs"), put a brake on the discretion of the supervisory official. Room for absolute discretionary censorship is inherent in the structure of the Rule.

The majority opinion does not think this Rule is a prior restraint. The majority asserts that the "department does not pretend to have authority to gag its employees before they speak. It claims the right to fire, demote, or suspend them after they speak. That is not a prior restraint; it is an after-the-fact sanction."

I fundamentally disagree with the majority's asserted distinction for two reasons. First, the majority's assertion is not supported by the factual record. The City does believe that it may sanction its firefighters for failing to receive clearance for any proposed speech. The December 31, 1985, memorandum from the City Manager, Ron Cox, to Moore states that "[b]oth Chief Duckworth and I directed you to say as little as possible and not discuss that events surrounding the fire. . . . You had stated you would say no more than what we had discussed and agreed upon . . . . You have been supplied with a copy of the Fire Department Rules and Regulations and are expected to know what those rules and regulations are . . . *you were directed verbally to refrain from any discussion of the events surrounding the fire.* This flagrant insubordination cannot and will not be tolerated. As a result, disciplinary action must be taken. . . . Mr. Moore, I remind you again that you are an employee of this City. *There will be no more public announcements, (sic) by you regarding your own opinion of any policies or directives issued by this City.*" (emphasis added).

The City Manager's understanding of the Rule is that he has the authority to order an employee not to speak in the future. The City Manager also believes that the Rule operates to keep employees from speaking unless they obtain permission.

My second disagreement concerning the majority's characterization of the Rule is that the majority treats the existence of a sanction on these facts as inherently distinct from the evil of a gag. The majority believes that if a person is sanctioned, one is necessarily left with the conclusion that the regulation operates as an "after-the-fact sanction." However, as I have discussed in Part C(2) *supra*, the majority fails to distinguish between two different types of sanctions and erroneously treats both as encompassing the constitutional idea of an after-the-fact sanction. Under the Kilgore rule, a firefighter who speaks without the Chief's blessing can be sanctioned for two distinct reasons: the failure to receive prior clearance; and the failure to speak acceptable words. The majority's conflation of these two different ideas leads to the mistaken legal conclusion if an offending employee is penalized "after-the-fact" that necessarily means that the rule is not a prior restraint. The sanction that flows from a failure to receive prior clearance is a sanction which attempts to enforce a prior restraint. But such a prior restraint-sanction is not, in the constitutional sense, an after-the-fact sanction. The majority errs in its characterization of the Kilgore Rule because it fails to identify the source of the sanction – a prior restraint. All of the majority's resulting errors flow from this one threshold error: the conflation of an after-the-fact sanction with a prior restraint sanction. A government's discretionary ability to apply a prior restraint is no less undesirable because the speaker has, at his or her own peril, ignored the government's dictates.

The crucial examination which leads to my result that Kilgore's Rule is a prior restraint focuses on what the

speaker must do or cannot do as viewed from the speaker's viewpoint. *Standing in the shoes* of the potential speaker, (the internal viewpoint), one sees that the Kilgore Rule directs Moore, or any other Fire Department employee, to seek the Chief's approval before speaking. There are no guidelines for the Chief to apply to decide what to authorize and what not to authorize. In this situation, the Chief has the opportunity to act as a censor of the viewpoints of the fire department's employees. If the speaker must seek permission or review before speaking, then the system is a prior restraint. Of course, the fact that a rule is a prior restraint does not mean that the rule is *per se* unconstitutional.

If viewed from the speaker's viewpoint, a court decides that a speaker does not have to receive prior permission, only then should the court adopt the external viewpoint and ask the second question of whether speech is, in fact, gagged. If speech is gagged, the gag is also a prior restraint. But in analytical terms, this type of prior restraint is distinct from the clearance-type of prior restraint which looks at the rule from the speaker's viewpoint. See discussion in Part C-2.

Again, the majority errs in believing that the second type of prior restraint – the gagged speech – is the only type of prior restraint. Kilgore' Rule, on its face, is a screening-type of prior restraint.

## 2. Can This Plaintiff Complain of the Rule's Facial Invalidity?

As I have stated, the City of Kilgore enforced its prior restraint. Moore was, in part, punished for disobeying the

mandate of the restraint. He was also punished for the content of his speech. He has been vindicated in Part I of this opinion for the application of the rule to the content of his speech. Moore also seeks vindication for his being subject to a screening device which has the potential to suppress undesirable speech.

Thus, because the Rule on its face operates as a prior restraint, and because the sanctioning of Moore manifests the evil contained in the Rule's prior restraint character, we are left with one question: whether Moore, who has prevailed upon his contention that the Rule was unconstitutionally applied to him, can attack the Rule on its face as an unconstitutional prior restraint. See generally Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 244 (1988). The majority finds that Moore has received all the relief due him, and therefore he can only challenge the Kilgore Rule on the ground of overbreadth as applied to him and not to any third parties. I disagree.

If this court does not entertain Moore's facial challenge, Kilgore's Rule will continue in force. We should, therefore, inquire into what happens if this court permits this prior restraint to stand. To accomplish this inquiry, it is necessary to see how this prior restraint affects the First Amendment's underlying values.

The existence of Kilgore's Rule threatens at least three of the values that undergird the First Amendment: truth, knowledge, and tolerance. One must create two categories of cases to see the effect of a prior restraint on the three stated values. The first category of prior restraints, which the majority believes is the only category, encompasses a situation in which the prior restraint



is successful – the speech is gagged. This situation exists here not from the face of the Rule, but from the City's directive to Moore implementing the Rule. Moore has been directed not to speak about any public matters from the time of the directive into eternity. When speech is gagged, as the directive now has the effect of achieving, the words do not go forth. The public does not receive information, so the public is denied the opportunity to judge the truth of the speech, and is deprived of useful knowledge necessary to be able to make informed decisions. In addition, the effect of such a prior restraint is to introduce the probability of censorship by the supervisory official. See *Lovell v. Griffin*, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938). Especially with a prior restraint such as Kilgore's, which has no guidelines, the restraining discretion serves as a "device for the suppression of the communication of ideas and permits the official to act as a censor." *Cox v. Louisiana*, 379 U.S. 536, 557, 85 S.Ct. 453, 465, 13 L.Ed.2d 471 (1965). Censorship distorts the dissemination of truth and knowledge to conform with the official's vision of truth and knowledge.

A successful restraint also indulges the worst tendencies of intolerance found in all of us including the governmental official. Moore's speech presents the archetypical example. His speech was critical of the fire department's handling of a fire. This criticism upset the department. The supervisory official, the City Manager, punished Moore both for his speech and directed him not to speak anymore. Tolerance was hardly the watchword for the City of Kilgore's actions.

Since Moore bypassed the prior restraint established on the face of the Rule and went ahead and spoke out

about the handling of the December 26 fire (although the City has succeeded in placing a blanket prohibition for all future speech to which Moore feels bound), does the Rule still have deleterious effects on the First Amendment? The restraint's chilling effects and problems of proof supply the answer. To bypass a prior restraint requires tremendous verve from the speaker; foolhardiness is another way of stating the same thing, for the speaker must risk receiving a sanction not for the speech expressed but for ignoring the screening procedure. Verve is not, however, a constitutional requirement. Courts and scholars usually express this idea as the "chilling effect" of a prior restraint. See *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975). In constitutional terms, the speech of the timorous is as important as the words of the bold. The First Amendment must therefore protect equally the fearless and the shy. In regard to free speech values, chilled speech also results, like suppressed speech, in a loss of truth, knowledge and tolerance. We should treat similarly the two categories of prior restraints.

Because of the tremendously harmful effects a prior restraint can have on our system of free speech, "[a]ny system of prior restraints of expression comes to [the court] bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, 83 S.Ct. 631, 639, 9 L.Ed.2d 584 (1963); see also *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931). The Government 'thus carries a heavy burden of showing justification for the imposition of such a restraint.' *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419, 91 S.Ct. 1575, 1578, 29 L.Ed.2d 1 (1971)." *New*

*York Times Co. v. United States*, 403 U.S. 713, 91 S.Ct. 2140, 2141, 29 L.Ed.2d 822 (1971) (Pentagon Papers) (per curiam).

3. Constitutional Imperative to Consider Facial Challenge When Rule is Invalid in All its Applications.

Because of a prior restraint's effects on First Amendment values and the heavy presumption of invalidity a prior restraint bears, the constitution commands us to grant this plaintiff standing to hear his facial challenge in this situation because the restraint is invalid in all its applications.

The majority errs when it analyzes the Kilgore Rule only in terms of the substantial overbreadth doctrine. This error flows from the majority's mischaracterization of the Rule as an after-the-fact sanction. If the majority were to recognize that this Rule is a prior restraint, then the majority would be constitutionally compelled to examine the Rule, not under the substantial overbreadth doctrine, but under the *Lakewood-Munson-Vincent* line of cases. See *City of Lakewood v. Plain Dealer Publishing Co.*, \_\_\_ U.S. \_\_\_, 108 S.Ct. 2138, 2143-45, 100 L.Ed.2d 771 (1988); *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 962, 104 S.Ct. 2839, 2849, 2851-52 n. 13, 81 L.Ed.2d 786 (1984); *Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 796-97, 104 S.Ct. 2118, 2124-25, 80 L.Ed.2d 772 (1984). See discussion in Part C(2) *supra*.

Is Kilgore's prior restraint invalid in all applications? The district court believed that this prior restraint was permissible "[f]or a variety of reasons, including safety

and security, this is an area of legitimate government interest to control, or at least monitor, statements made by employees on possibly confidential or sensitive matters to prevent indiscrete disclosures." The majority takes a narrower view of what constitutionally could be restrained – "[e]mployers will have to act as spokespeople. Speech that would be damaging to the department if made without supervisory approval may be essential to the department if made with approval."

The majority raises an interesting question about a governmental employer managing its own speech. There are certainly times a governmental body must utilize a spokesperson to communicate an "official" message to either the public or the members of the institution. Such speech often involves prior approval by supervisors to be sure the correct message is being communicated. The majority is correct that some sort of prior restraint could, hypothetically, be a legitimate restriction. Hypothetical interests are not, however, constitutionally sufficient. The test for a constitutional speech restriction is whether the restriction is narrowly tailored to serve a *proven compelling governmental interest*. *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 104 S.Ct. 2839, 2849, 81 L.Ed.2d 786 (1984); *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637, 100 S.Ct. 826, 836, 63 L.Ed.2d 73 (1980); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419, 91 S.Ct. 1575, 1577, 29 L.Ed.2d 1 (1971) (governmental interest must be proved in the record).

Kilgore, as a matter of evidence, has not presented proof of a compelling governmental interest – except possibly one interest: the release of information relating to an arson investigation. The interest in controlling

spokespersons is not supported in the record. See *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419, 91 S.Ct. 1575, 1577, 29 L.Ed.2d 1 (1971). Therefore we cannot consider it.

Premature release of an arson suspect's name, and crucial and unique details concerning an arson fire would likely constitute compelling governmental interests. These governmental interests are supported in the record. However, a compelling government interest is only half of the inquiry. *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 104 S.Ct. 2839, 2849, 81 L.Ed.2d 786 (1984); *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637, 100 S.Ct. 826, 836, 63 L.Ed.2d 73 (1980). Narrowness and specificity, which provide notice to potential speakers, are the touchstones of a constitutional prior restriction. See *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 183-84, 89 S.Ct. 347, 352-53, 21 L.Ed.2d 325 (1968). Narrowness which is carefully tailored to the compelling interest must be present. Otherwise, the Rule is unconstitutional in every application. Nothing about the Kilgore Rule is narrow. The Rule covers release of any information relevant to department policy, practices, or business affairs. Most anything is "relevant" if it even approaches the subject matter. See generally Fed.R.Evid. 401.

Kilgore's Rule does not limit prior clearance to details of an arson investigation. The Rule does not place durational limits on the clearance feature; presumably, fifteen years after the closure of an arson investigation and conviction, a firefighter would still need prior clearance to comply with the Rule. The record is completely devoid of evidence that Kilgore has narrowing guidelines

which relate directly to the proven compelling government interest. Without narrow guidelines, the discretion of the City is unconstitutionally boundless. Because the Rule is without guidelines, it could never be applied constitutionally, even if the speech involved details of an arson fire. The inherent censorship quality of this Rule dooms its every application to unconstitutional death. Kilgore's vision of narrowness is akin to a venture to catch one salmon in the ocean by using 1000 yards of netting at the mouth of a river in salmon season. Such a knotted webbing nets not only the one needed, sought-after salmon. An entire school suffers from the sweeping endeavor.

The fatal flaw in Kilgore's Rule is the lack of standards limiting the discretion of a supervising official. See *City of Lakewood v. Plain Dealer Pub. Co.*, \_\_\_ U.S. \_\_\_, 108 S.Ct. 2138, 2144-45, 100 L.Ed.2d 771 (1988). Without guidelines, a reviewing court cannot adequately and easily determine whether the censor suppressed the speech for legitimate or illegitimate reasons. *Id.* 108 S.Ct. at 2144. "Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech. Without these guideposts, post hoc rationalizations by the licensing officials and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression." *City of Lakewood*, 108 S.Ct. at 2144; see also *Freedman v. State of Maryland*, 380 U.S. 51, 85 S.Ct. 734, 739-40, 13 L.Ed.2d 649 (1965).



It is the lack of narrow standards, expressing proven, compelling governmental interests, that makes this prior restraint unconstitutional in all conceivable applications. "It is when statutes threaten [the risks of unbridled censorship schemes – self-censorship by speakers in order to avoid being denied a license to speak, and the difficulty of effectively detecting, reviewing, and correcting content-based censorship 'as applied' without standards by which to measure the censor's action –] to a significant degree that courts must entertain an immediate facial attack on the law." *City of Lakewood*, 108 S.Ct. at 2145 (emphasis added). As the Kilgore Rule is written, there is no valid application. Therefore the majority is correct that the substantial overbreadth doctrine offers no avenue of relief for Moore. The generic notion, however, of a statute's ambit sweeping too far – descriptive overbreadth – should offer relief to Moore because the Rule constitutes an unconstitutional prior restraint.

### Conclusion

Citizens care deeply about the ability of their local fire department to fight fires effectively. In the long term interests of the City's people, Moore's speech will help produce a fire department that is increasingly responsive to the needs of the citizenry. If the necessity for a responsive department were not of universal concern, then the citizens of Kilgore, Texas, would live in fear of a horrible holocaust. Within memory's distance of nearby New

London, Texas,<sup>13</sup> the people of Kilgore have a right to know how effective their fire department is and how ready it is to battle a potentially tragic blaze.

Moore spoke out concerning a matter of great public concern. In return for his valuable speech, the City disciplined him. Under the *Pickering/Connick* balancing test, we conclude that Moore's speech falls on the weighted side of the balance and is constitutionally protected under the First Amendment. Thus, the City cannot constitutionally punish Moore for his speech. We reverse the district court on this ground and remand for a trial on the issue of appropriate relief.

The majority affirms the district court's holding that the Kilgore Rule is facially constitutional. I disagree.

We should entertain Moore's facial attack and strike down the Kilgore Rule as an unconstitutional prior restraint. I must say, I realize that the differences between the majority's view of this case and my view of this case is essentially a disagreement about the role of the judiciary. In this case, we have a person who has been injured by the sweep of an unconstitutional Rule and remedied for the unconstitutional application. But it would be hard

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<sup>13</sup> On March 18, 1937, an explosion occurred and fire engulfed an elementary school in New London, Texas. Casinghead gas had, presumably, accumulated in the basement. There were conflicting reasons given for what actually set off the explosion. As a result of the fire, 280 children and 14 adults died. The elementary school district reached beyond the boundaries of the little town of New London with its population of under 2000 people. In the history of a region, such a tragedy is not soon forgotten. See J. Clark & M. Halbouty, *The Last Boom* 253-57 (1972).

to imagine a case which presents the issue of the facial viability of the Kilgore Rule more adroitly than Moore's case. I believe we must take every legitimate opportunity to assure the continued vitality of the First Amendment's exalted position in our "concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937) (Cardozo, J.), by pretermittting, if possible, infringements upon the First Amendment. I think the majority errs when it does not confront head-on the evil of censorship presented by Kilgore's Rule. For these reasons, I dissent from Part II of the Court's opinion.

HIGGINBOTHAM, Circuit Judge, with whom DAVIS, Circuit Judge, joins:

## I

We agree that, for the reasons stated in Judge Goldberg's opinion, the Kilgore fire department rule was unconstitutionally applied to appellant Moore.

## II

Moore contends that Kilgore Fire Rule 4.2A(40) is unconstitutional not only as applied in this case, but facially. We need not entertain this argument. Our holding that the rule was unconstitutionally applied entitles Moore to all relief due him. Because Moore's conduct was constitutionally protected, Moore is entitled to the job benefits which the City denied him on the basis of that conduct. Likewise, and for the same reason, the City may not apply its rule in the future to prohibit the sort of policy criticisms which precipitated this suit.

In short, the City must give back what it took away from Moore, and the City cannot impose any similar penalty on his speech in the future. More than this has not been demanded, and more than this we cannot give. Having found that the statute was unconstitutionally applied, there is no need to consider a facial attack.

This conclusion is entirely consistent with the rationales underlying the First Amendment doctrines pertaining to facial unconstitutionality. In his briefs to this Court, Moore footed his facial challenge to the Fire Department Rule entirely upon grounds of overbreadth. The overbreadth doctrine permits plaintiffs whose own conduct is not constitutionally protected to assert the rights of third parties whose protected speech might be chilled by the statute or rule under consideration. "[T]here must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties *not before the Court* for it to be facially challenged on overbreadth grounds." *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 104 S.Ct. 2118, 2125-26, 80 S.Ct. 772 (1984) (emphasis added).

Yet Moore makes no attempt to assert the rights of third parties not before us. Instead, his claim, made quite explicitly by his briefs, is that the statute is overbroad precisely because it applies to him – the plaintiff who *is* before us. As the Supreme Court has held in similar circumstances, "[t]his is not . . . an appropriate case to entertain a facial challenge based on overbreadth. For we have found nothing in the record to indicate that the ordinance will have any different impact on any third parties' interests in free speech than it has on [Moore]." 104 S.Ct. at 2127. The reasoning of *Taxpayers for Vincent*

does not permit us to make an overbreadth inquiry here. *Accord, Street v. New York*, 394 U.S. 576, 581, 89 S.Ct. 1354, 1360, 22 L.Ed.2d 572 (1969) (declining, in an opinion for the Court by Justice Harlan, to reach facial challenges to the statute because the statute was unconstitutionally applied).

There are good reasons for such a restriction. The overbreadth doctrine is an "exception to ordinary standing requirements," and it must be carefully construed lest it "swallow the general rule." 104 S.Ct. at 2126. Because the doctrine is "strong medicine," it "has been employed by the Court sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S.Ct. 2908, 2916, 37 L.Ed.2d 830 (1973). We need not here proceed to last resorts, because the case has been disposed of on the basis of the Rule's application to the plaintiff before us.

Were we in fact to ignore *Taxpayers for Vincent*, and proceed to consider the overbreadth question, we would immediately find ourselves immersed in inquiries so speculative as to border upon the metaphysical. For example, a holding that the Fire Department Rule is facially unconstitutional, because overbroad, would forbid "any enforcement" of the rule "until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression." *Broadrick*, 413 U.S. at 613, 93 S.Ct. at 2916. The holding would not, in other words, merely prohibit application of Rule 4.2A(40) to political criticisms like those made by Moore - a prohibition which, in any event, follows from our decision that the Rule was unconstitutionally applied. The overbreadth

holding would also forbid application of the rule to conduct which the employer clearly does have the authority to punish, such as, for example, spreading malicious gossip about fire department employees.

The Supreme Court, however, held in *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) that an employer may constitutionally punish this sort of speech even in the absence of any rule. The Court in that case upheld the employee's discharge even though the employee "did not violate announced office policy" at all. 103 S.Ct. at 1693 & n. 14. Could Kilgore therefore continue to punish all conduct within the legitimate sweep of Rule 4.2A(40), even if we held the rule overbroad, so long as Kilgore relied upon its general, discretionary authority to discipline employees, rather than upon the rule? Would the case turn upon whether Kilgore cited the rule? Or would Kilgore's discretion to discipline its employees be eliminated entirely by a defective attempt to channel that discretion? All of these results appear absurd.

Even to reach these abstract ruminations we must undertake another set of speculative gymnastics. The overbreadth doctrine will not invalidate a statute or rule unless its overbreadth is "not only . . . real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 104 S.Ct. at 2126. Certainly here the Kilgore Rule sweeps too far, since, as construed by the City, it encompasses Moore's conduct, which we have held constitutionally protected. The overbreadth is thus real, but that does not prove it substantial. In order to discover whether it was, we would have to hypothesize both the legitimate and the illegitimate applications, and somehow compare the two.



The statute certainly has a significant and lawful core application. As the *Connick* Court indicated, we must respect the government's legitimate interest in regulating the speech of its employees concerning matters related to their employment. The *Connick* Court recognized the importance of this interest. The Court quoted with approval Justice Powell's observation that

To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.

*Connick*, 103 S.Ct. at 1692, quoting *Arnett v. Kennedy*, 416 U.S. 134, 168, 94 S.Ct. 1633, 1651, 40 L.Ed.2d 15 (1974) (Powell, J., concurring). This circuit has long recognized – even before the Supreme Court reversed our own disposition of *Connick* – that it would be unwise “to circumscribe narrowly [a public employer's] discretion in promoting the ends of ‘discipline, esprit de corps, and uniformity’ among his . . . officers.” *Barrett v. Thomas*, 649 F.2d 1193, 1198 (5th Cir.1981) (Pre-*Connick* case), quoting *Kelley v. Johnson*, 425 U.S. 238, 246, 96 S.Ct. 1440, 1445, 47 L.Ed.2d 708 (1976).

A fire department must have the authority to sanction its workers for releasing confidential facts that will compromise ongoing investigations or business negotiations; for spreading malicious gossip about co-workers;

for misrepresenting departmental positions; for lying; or for acting without permission as official spokespeople for the department.

The comparison between these legitimate applications of Rule 4.2A(40) and its illegitimate applications would be highly speculative. Fortunately, under the rule of *Taxpayers for Vincent*, we need not pursue that inquiry.

This case does not implicate at all a second line of cases, a line which holds certain statutes facially unconstitutional not because of overbreadth but because they vest officials with unfettered discretion to censor what speech they choose. See *City of Lakewood v. Plain Dealer Publishing Co.*, \_\_\_ U.S. \_\_\_, 108 S.Ct. 2138, 2150-52, 100 L.Ed.2d 771 (1988); *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965); *Cox v. Louisiana*, 379 U.S. 536, 557, 85 S.Ct. 453, 465, 13 L.Ed.2d 471 (1965); *Lovell v. Griffin*, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938). Moore himself quite clearly phrases his facial challenge to the rule as an overbreadth challenge. No "unfettered discretion" argument has been properly made to this court.

In any event, the "unfettered discretion" cases deal with instances in which "a holding of facial invalidity expresses the conclusion that the statute could never be applied in a valid manner." *Taxpayers for Vincent*, 104 S.Ct. at 2125. Those cases are inapplicable here. Kilgore's rule clearly does, as already explained, have valid applications.

Those valid applications remain even though the rule leaves discretion to the public employer. As *Connick* made clear, the employer may discharge employees for their

speech even in the absence of any announced policy. Certainly the absence of a policy permits the employer substantial discretion. The employer's adoption of an office policy, notifying employees of how the employer intends to use its discretion, does not require the employer to abandon its discretion.

Nor, finally, is the rule a prior restraint. The department does not pretend to have authority to gag its employees before they speak. It claims the right to fire, demote, or suspend them after they speak. That is not a prior restraint; it is an after-the-fact sanction. The Kilgore fire department is not proposing to do anything that is analogous to shutting down the presses, as the government sought to do in *New York Times Co. v. United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971), and *Near v. Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931). Nor does the Kilgore rule authorize police to interrupt speech in progress, as happens when a city rule allows police officers to disperse a demonstration or to muffle a loudspeaker.

True, the City did ask its employees to seek permission before they spoke. But offending employees are penalized after-the-fact, by the loss of their jobs. They are not gagged or subjected to an injunction. Demotion and suspension was the fate suffered by Moore, and the event that precipitated this suit. Kilgore did not stop him from getting his message out.

The difference is crucial. The great evil of a prior restraint is that it prevents the public from receiving the information possessed by the gagged speaker, and so from judging the information's worth and the speaker's

case. If a sanction is instead applied after-the-fact, angry voters may vindicate the speaker's rights, by removing from office those who imposed the sanction. Prior restraints are constitutionally suspect because they deprive speakers of recourse to the people, who are inevitably the ultimate, and the most important, protector of justice in American politics.

These concerns are not implicated by Kilgore's rule. And, indeed, it is difficult to see how any government employer could regulate speech without, more or less directly, carving out an exception for speech approved by the employer. Employees will sometimes have to act as spokespeople. Speech that would be damaging to the department if made without supervisory approval may be essential to the department if made with approval.

The Kilgore fire department's rule was applied unconstitutionally in this case. We need not go further to decide its facial constitutionality.

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**APPENDIX NO. 2**

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

**NO. 87-2783**

**GARY D. MOORE**

**VERSUS**

**CITY OF KILGORE, TEXAS**

Ms. Elizabeth K. Julian, 3108 Live Oak, Dallas, Texas  
75204; Mr. Michael M. Daniel, 3301 Elm Street, Dallas,  
Texas 75226

Mr. Tracy Crawford, P. O. Box 629, Tyler, Texas 75710  
STEGER, W., District Judge

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS**

**TYLER DIVISION**

GARY D. MOORE

VS.

THE CITY OF KILGORE, TEXAS

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NO. TY-86-54-CA

(Filed June 15, 1987)

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

On June 18, 1986, came on for trial before the Court the above-entitled and numbered cause. Having heard the evidence presented and having duly considered all testimony, exhibits and arguments, the Court now enters these Findings of Fact and Conclusions of Law in conformity with Fed. R. Civ. P. 52(a). Any finding of fact that

constitutes a conclusion of law shall be deemed a conclusion of law. Any conclusion of law that constitutes a finding of fact shall be deemed a finding of fact.

### *FINDINGS OF FACT*

1. Plaintiff, Gary D. Moore, is an adult male citizen of the United States and a resident of the State of Texas. He has been employed by the City of Kilgore Fire Department in Kilgore, Texas, since October 6, 1980, and continues in that capacity. Plaintiff is also president of the Kilgore Professional Fire Fighters Association (Fire Fighters Association), Local 2996. In that capacity he acts as spokesman for the Fire Fighters Association. It is undisputed for purposes of this action that the Fire Fighters Association is not recognized by the City of Kilgore as the collective bargaining representative for Fire Department employees.

2. Defendant, City of Kilgore (City), is a home rule city incorporated and operating as a political subdivision under the laws of the State of Texas and is located within the Eastern District of Texas.

3. During September and October of 1985, Moore spoke publicly on behalf of the Fire Fighters Association in opposition to the City's decision to make budget cuts with the effect of reducing the number of City employees. The Fire Department was among the departments which would suffer a reduction in forces.

4. Both Moore and representatives of the City made statements to the local news media regarding the reduction in forces and the possible impact on City services,



and specifically the reduction in the number of firefighters. This dialogue received prominent coverage in the area press. Articles containing Moore's photograph and quotes from his press conferences were published. The Fire Fighters Association purchased newspaper advertisements opposing the reduction in firefighter forces. *See Plaintiff's Exhibit 2.*

5. The budget cuts and concomitant loss of employment became effective on October 1, 1985. Approximately fifteen Kilgore firefighters were laid off.

6. In the early morning hours of December 26, 1985, a fire occurred in the City of Kilgore and units of the Kilgore Fire Department responded. One firefighter died from an apparent heart attack while battling the blaze and another firefighter sustained an injury in a fall.

7. Familiar with Moore as the spokesman for the Fire Fighters Association, local news media approached Moore for his comments on the events of December 26, 1985. Before making any statement to the press, Moore felt it advisable to confer with City Manager Ron Cox concerning the content of any statement he might make. He did this to insure that any statement he might make would not conflict with the information being released by the City.

8. In the afternoon of December 26, 1985, Plaintiff went to the office of the City Manager with a two-fold purpose. First, to assist in expediting the paperwork that would be necessary to insure that the family of the deceased firefighter received their benefits in a timely fashion. Second, to inform the City Manager that the press wanted a statement from Moore on the tragedy and

to coordinate with the City on what information should be released at that point.

9. The City Manager recommended that Plaintiff limit his public comments to an expression of sympathy and regret on behalf of the Fire Fighters Association over the loss of a fellow firefighter. This recommendation was based on the City Manager's knowledge that there were still many unanswered questions about the origin of the fire and the death and injury to firefighters. The City Manager was also concerned that unguarded statements could negatively impact a pending criminal arson investigation and the successful prosecution of the case.

10. On December 26, 1985, Moore appeared at a public news conference and made statements about the fire and events which occurred at the fire. Specifically, Moore discussed the units that responded to the call, the number of firefighters assigned to the units, the duties of firefighters while fighting a fire, and possible causes of death and injury to the firefighters. These comments followed his expression of sorrow over the loss of the firefighter and were in response to questions from the press. Moore strongly suggested that but for the manpower reductions resulting from the budget cuts that the death and injury to these firefighters could have been avoided. The thrust of Moore's comments was to vindicate the Fire Fighters Association who had publicly opposed the budget cuts which had been implemented on October 1, 1985. The statements were published on December 27 and 28, 1985.

11. On December 31, 1985, the City Manager called Moore to his office for an explanation of the comments

and for disciplinary action. Plaintiff was given an opportunity to explain his actions but, when he was told the meeting would be recorded, refused to participate in the meeting without representation. On that day the City Manager took the following action against Moore: (1) suspension without pay for thirty (30) days; (2) demotion from driver to firefighter; (3) probation for six months; and (4) prohibition from visiting any fire station during the suspension without City approval.

12. The Court rejects out of hand any suggestion that the disciplinary action taken against Moore was in retaliation for Moore's representation of the Fire Fighters Associations' policy position during the time prior to December 26, 1985. The evidence is clearly to the contrary. At no time prior to December 26, 1985, had the City government attempted to punish Moore or the Fire Fighters Association for their public opposition to the decision to make budget cuts.

13. Moore's comments of December 26, 1985, were a substantial or motivating factor in the City Manager's decision to discipline Moore. In other words, but for those comments, Moore would have not been disciplined.

14. The court credits the testimony of City Manager Ron Cox who testified that Plaintiff was disciplined for the statements summarized below:

(1) Moore's statement that a shortage of manpower existed and his implication that the shortage of firefighters caused the fatal heart attack of one firefighter and the injury to another;

(2) Moore's statements about Fire Department companies and the number of firefighters composing those companies;

(3) Moore's implication that the injured firefighter was performing a job alone when he was injured that should properly have been performed by two firefighters;

(4) Moore's characterization of the fire as an "ordinary structure fire," in light of evidence that suggested the fire was caused by arson; and

(5) Moore's statement that "We're in a position to say 'I told you so,' to the City."

See Plaintiff's Exhibit 2.

15. It is undisputed that Plaintiff was disciplined for the content of his remarks made at the press conference. The City Manager's actions were based on Moore's disregard of a directive from a superior officer, breach of their agreement to limit information released, and violation of Article 4.2A(40) of the Rules and Regulations of the Kilgore Fire Department.<sup>1</sup>

### DISCUSSION

Plaintiff brings this action for damages against the City of Kilgore for deprivation of his right to free speech guaranteed by the first amendment and made applicable to the states through the fourteenth amendment. *Wallace*

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<sup>1</sup> The rule requests that a fire department employee "Refrain from furnishing information relative to department policy practices, or business affairs except authorized by the Chief of the Department."

*v. Jaffree*, 105 S.Ct. 2479, 2486 (1985). He also seeks injunctive and declaratory relief from the operation Rule 4.2A(40) of the Rules and Regulations of the City of Kilgore Fire Department.

Plaintiff contends that he was disciplined for engaging in protected speech and but for that speech he would not have been disciplined, relying only upon the holdings of *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977); *Pickering v. Board of Education*, 391 U.S. 563 (1968). Plaintiff further contends that City of Kilgore Fire Department Rule 4.2A(40), upon which the disciplinary action was based, was unconstitutionally applied in this case, is facially unconstitutional for overbreadth, and continues to operate to chill protected speech on matters of public concern. *See Barrett v. Thomas*, 649 F.2d 1193, 1199 (5th Cir. 1981).

Defendant contends that Plaintiff was punished for insubordinate conduct, that is, he made public statements concerning a fire when he had been specifically instructed by the City Manager not to address the issue for both administrative and security reasons.

To prevail on the § 1983 claim, Moore must bear the burden of proving that his public speech was constitutionally protected and that his participation in the protected activity was a substantial or motivating factor in his discipline. Upon satisfaction of this initial burden by the plaintiff, the defendant must prove that the same action would have been taken absent the protected conduct. *Mt. Healthy*, 97 S.Ct. at 568; *McKinley v. Baden*, 777 F.2d 1017 (5th Cir. 1985).

Defendants offered no evidence that they would have taken the same action absent Plaintiff's speech. In fact, it concedes that plaintiff was disciplined because of his speech. Therefore, the issues and dispositive questions of law, in the case at bar are narrowed to two. First, can the public statements made by Moore to the press on December 26, 1985, be fairly considered as speech addressed to matters of public concern. Second, if the initial inquiry is answered in the affirmative, is society's interest in Moore's freedom of speech outweighed by the City's interest in having employees who can be privy to possibly sensitive information without fear of divulgence for personal reasons or goals. Stated more broadly, if matters of public concern were addressed, this Court must strike a balance between first amendment protected speech on the one hand, and, the legitimate governmental interest in maintaining efficiency and discipline in the work place. *Connick v. Myers*, 103 S.Ct. 1964 (1983); *Pickering v. Board of Education*, 88 S.Ct. 1731 (1968); *McPherson v. Rankin*, 786 F.2d 1233 (5th Cir. 1986), cert. granted, 107 S.Ct. 313 (1986).

#### 1. *Matters of Public Concern*

"Whether an employee's speech addresses matters of public concern must be determined by the content, form, and context of a given statement, as revealed by the record as a whole." *Connick*, 103 S.Ct. at 1690 (footnote omitted); *Gomez v. Texas Department of Mental Health and Mental Retardation*, 794 F.2d 1018 (5th Cir. 1986). This initial analysis should focus on whether the speech at issue in a particular case was made primarily in the speaker's role as a citizen or in his role as an employee.



*Terrell v. University of Texas System Police*, 792 F.2d 1360 (5th Cir. 1986). A governmental employee does not, by virtue of his employment, enjoy a grant of immunity from adverse consequences for publicly airing employee grievances. *Connick*, 103 S.Ct. at 1690. Absent speech addressed to matters of public concern, the governmental employer enjoys the same disciplinary controls over its employees as does the private employer. *Id.*

Because almost anything that occurs in a public agency could be of concern to the public, a court does not focus on an inherent interest or importance of the matters discussed in resolving a First Amendment claim, but, rather, the court's task is to decide whether the speech at issue in a particular case was made primarily in the employee's role as a citizen or primarily in his role as an employee; the fact that the topic of the speech was one which the public might or would have a great interest is of little moment.

*Terrell*, 792 F.2d at 1362.

At the outset, the Court recognizes that matters of local government have both an inherent appeal to the general public and are perceived by them to be of great importance. No doubt the public's interest was piqued concerning the events and occurrences of December 26. Plaintiff makes much of the events during the fall of 1985 to demonstrate the degree of public interest.

But *Terrell*, *supra*, teaches that this is not the precise inquiry in a First Amendment analysis. The legal issue is whether Moore was speaking "primarily in (his) role as a citizen or primarily in (his) role as an employee." 792 F.2d at 1362.

a. *Content*

It is undisputed that but for the content of Moore's comments to the press on December 26, he would not have been disciplined. The Court has summarized the statements for which Moore was punished. It is clear that based on content alone, the only statement that could fairly be considered as addressing matters of public concern is the simple statement that the Kilgore Fire Department is understaffed. *See* Finding of Fact 14(1). After all, this was the issue that Moore had endeavored to keep before the City Commission and the public during the preceding four months. The City concedes that this issue was one of public concern and that it could not have punished Moore during that time for his participation in the budget and stuffing [sic] debate.

However, the remainder of Moore's statements address matters of personal concern. This is evident because the content of the statements does not focus on persuading a decision-making body or electorate, but rather is replete with carping criticisms, causation analysis that approaches fingerpointing, and divulgence of possibly sensitive information about the composition and duties of fire department companies in emergency situations.

His "I told you so" comment is evidence of Moore's intent to speak beyond where he had been instructed to stop. His opinions and speculation about the possible causes of the death and injury were not intended to add meaningful information to the staffing issue, but were intended to vindicate the position that he and his

employee organization had supported, but that was rejected by the City Commission.

His detailed information about the units assigned to the fire, crew members on each unit, and their respective duties was that known only to a fireman at that time. It was information that Moore misappropriated for use in his own cause, to publicly air his personal complaint about the reduction in force. It is this Court's opinion that these comments primarily addressed the concerns of an employee organization for which Moore acted as the spokesman. Crew safety and operational safety is no doubt of grave concern to these men, as employees. However, under these facts, it is not a topic that requires free and open debate to insure informed decision-making by the electorate. *See Gomez*, 794 F.2d at 1022.

b. *Context*

A "content" analysis supports protection for Moore's comment that the Department was understaffed, but finds the other comments for which he was disciplined undeserving of judicial protection. A "context" analysis yield similar results concerning the latter, and questions the necessity of protection for the former.

Clearly, on the day following a serious fire in which a firefighter was lost and another was injured, there are many questions to be resolved. The events must be analyzed by those who participated to determine the source of the problem and possible remedies. This requires time and investigation to insure that the conclusions drawn are valid. The public and City depend upon

this investigative process to insure effective government service.

In this context, day-after opinions and speculations by Moore, as a City employee, to the print media are suspect, regardless of whether they are ultimately proven valid. Off the cuff causation analysis provided at the request of news reporters that ultimately degenerates into finger-pointing is clearly outside the protections offered to speech on matters of public concern. As such, "a federal court is not the appropriate forum in which to review the wisdom of a personnel decision" taken by the City in response to the speech. See *Connick*, 103 S.Ct. at 1690.

The same may be said, although not so forcefully, for continued debate of the staffing issue. This is true for the following reasons. First, the Court credits the testimony of Ron Cox who stated that Moore's comments on behalf of the Fire Fighters Association would be limited by agreement to expressions of sympathy for the lost firefighter because of the uncertainty surrounding the fire. Apparently both men understood that discretion would be required. Second, and more persuasively, is that the need for public debate on the staffing issue had passed. The City Commission had chosen their policy and implemented the same as of October 1, 1985; three months before Moore's comments. Moore had opposed the action publicly on behalf of the Association, but his proposed course was not the one followed. The issue, as of December 26, was moot. Using this misfortune as the first opportunity to rehash this issue does not directly address matters of public concern, but rather smacks of a disgruntled employee attempting to draw public attention to this

job-related issue. To hold these comments were matters of public interest is to affirm the obvious; to hold them as legitimate matters of public concern is much more difficult.

### 1. *Pickering/Connick Balance*

*Connick* requires that this balancing be undertaken on a case-by-case basis. *Connick*, 103 S.Ct. at 1692; *McAdams v. Matagorda County*, 798 F.2d 842 (5th Cir. 1986). This analysis begins with emphasis on the legitimate interest of government in maintaining discipline over those in its service so that its duties may be discharged with efficiency and integrity. *Connick*, 103 S.Ct. at 1691; *McBee*, 730 F.2d at 1013. Among the factors weighed in the *Connick/Pickering* balance are:

- (1) whether the employee's expressions under examination impeded his abilities to perform his duties – noticing, as a significant factor in that overall analysis, the effect on those expressions on his working relationship with his superiors;
- (2) the degree to which the employee's expressions involved matters of public concern and the gravity of that concern;
- (3) the time, place, and manner of the expressions; and
- (4) the employee's motives in voicing the expressions at issue and their context.

*McBee*, 730 F.2d at 1013.

Moore's statements were directed to City Commissioners, but included his superiors in their sweep. His personal bitterness is understandable; but his lack of

professional demeanor is not, especially after the admonitions of the City Manager prior to the press conference. Cox testified that in his opinion, Moore had violated their agreement, and that such conduct was insubordination. Further, Cox feared that Moore would be perceived as speaking for the City, and his hasty and perhaps, erroneous theories would impair the integrity of the Department and negatively affect the public's perception of Department management. At best, Moore's comments were professionally irresponsible considering the timing of his statements.

Additionally, it is unquestioned that "[b]ecause of the nature of firefighting, and its high stakes, operational efficiency and harmony among co-workers are critical." *Bickel v. Burkhard*, 632 F.2d 1251 (5th Cir. 1980). There was scant evidence that Moore's comments generated internal turbulence among the firefighters. Presumably, since his employment was not terminated the City did not believe Moore's continued presence was a serious threat to departmental harmony. Had Moore been terminated instead of disciplined this factor would weigh heavier in the balance. On the other hand, because this Court has found that this speech was, under the circumstances, only remotely related to core matters of public concern, the City's burden to show disruption of departmental harmony is minimal, see *McBee*, 730 F.2d at 1017, and is sufficiently in evidence here.

Consideration of the time, place, and manner of Moore's statements also weighs in favor of the City. Shortly before making this statements, Moore visited with City Manager Cox to discuss what information should be passed to the press. He was instructed to limit



his comments to an expression of sympathy on behalf of the Fire Fighters Association and was given reasons why this limitation was proper at that time. He was instructed to temper his comments with sensitivity and discretion, which he agreed, but failed to do.

Close working relationships are essential to efficient and effective operation of a fire department. The inherent danger of the work plus close living arrangements dictates that harmony in the ranks is essential. Statements calculated to create disharmony, promote conflict, promote public and professional doubt in the Department's integrity and efficiency deserve little weight in the balance. Statements made in an attempt to turn a tragic event such as the death of a fireman into political fodder over a moot issue deserves less.

Nor is the evidence from this case sufficient to strike down the regulation in question as facially - always and however applied - invalid. The regulation requires clearance through department channels before releasing information "relative to department policy practices, or business affairs." For a variety of reasons, including safety and security, this is an area of legitimate government interest to control, or at least monitor, statements made by employees on possibly confidential or sensitive matters to prevent indiscrete disclosures. The rule on its face does not sweep beyond the constitutional barrier.

### CONCLUSIONS OF LAW

1. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1331.

2. Venue is proper in the Eastern District of Texas, Tyler division. 28 U.S.C. § 1391(b).

3. With the exception of Plaintiff's expression that the Kilgore Fire Department is understaffed, Plaintiff's speech on the date in question does not address matters of public concern. All other expressions are properly characterized as concerning matters of personal interest to Moore as an employee.

4. The speech that did address a matter of public concern is not entitled to judicial protection because the Court is convinced that, for the reasons previously set forth, the Pickering/Connick balance tips in favor of the City.

5. Rule 4.2A(40) was not unconstitutionally applied in this case.

6. Rule 4.2A(40) is not facially unconstitutional for overbreadth.

7. Plaintiff is not entitled to damages, injunctive, or declaratory relief.

8. Judgment shall enter for the Defendant and each party shall bear its own costs of action.

SIGNED this 15th day of June, 1987.

/s/ William M. Steger  
UNITED STATES DISTRICT JUDGE

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APPENDIX NO. 3

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

NO. 87-2783

GARY D. MOORE

VERSUS

CITY OF KILGORE, TEXAS

JUDGMENT

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

GARY D. MOORE

VS.

THE CITY OF KILGORE, TEXAS

)

) NO. TY-86-54-CA

)

(Filed June 15, 1987)

JUDGMENT

This action having come on for trial before the Court, with a jury, and the issues having been tried and a decision having been duly rendered, the Court has heretofore this day entered its Findings of Fact and Conclusions of Law directing judgment for the reasons stated therein. It is thereby

ORDERED, ADJUDGED and DECREED that Defendant City of Kilgore have judgment over and against Plaintiff Gary Moore, and that Plaintiff take nothing by virtue of his claims against Defendant. It is further

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ORDERED, ADJUDGED and DECREED that costs are to be borne by the party incurring the same.

SIGNED this 15th day of June, 1987.

/s/ William M. Steger  
UNITED STATES DISTRICT JUDGE

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No. 89-630

Supreme Court, U.S.

FILED

NOV 13 1989

JOSEPH F. SPANIOL, JR.  
CLERK

In The  
**Supreme Court of the United States**  
October Term, 1989

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THE CITY OF KILGORE, TEXAS,  
*Petitioner,*  
vs.

GARY D. MOORE,  
*Respondent.*

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On Writ Of Certiorari To The United States  
Court Of Appeals For The Fifth Circuit

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BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI

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## RESPONDENT'S STATEMENT OF THE CASE

Respondent disagrees with Petitioner's Statement of the Case insofar as on page 6 it states that an agreement to limit speech had been made and that Moore's statements to the press included factual misstatements, recklessly drawn conclusions, and false implications. The per curiam opinion of the Court of Appeals accurately states the facts of the case. The city manager suggested that Moore limit his response to an expression of sympathy for the family of his deceased colleague [Petition page A-6]. The City made no showing that Moore made false statements of fact with either knowledge of their falsity or with reckless disregard of their truth or falsity [Petition page A-29].

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## SUMMARY OF ARGUMENT

The cases cited by petitioner in support of its argument on conflicting Court of Appeals decisions are not in conflict with the decision in this case but rather involve the application of the same rules of decision to different fact situations.

The petition does not show that either the factual or legal prerequisites exist to support a holding that Moore waived his First Amendment rights through some form of agreement.

The existing U.S. Supreme Court precedent on the burden of proof and standard of appellate review in First Amendment cases reflects the unique value given to free speech in our laws and practices. The precedents serve to further that value. The petitioner's request to change the

precedent gives no weight to the value and should not be considered persuasive.

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## ARGUMENT

### I. The decision below does not conflict with the decisions of other Courts of Appeals

All of the circuits clearly recognize and follow the balancing test laid out in *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983). The Fifth Circuit explicitly recognized and followed the same balancing test in this case.

In reviewing the speech to see if it is of public concern, *Fiorillo* states that the nature of the whole communication must be examined. *Fiorillo v. U.S. Department of Justice*, 795 F.2d 1544 (Fed. Cir. 1986). The Fifth Circuit did just that by looking at the entire record and examining the context of Mr. Moore's speech. The Fifth Circuit took into account all of the surrounding circumstances thus conforming to the requirement laid out in *Fiorillo*.

Petitioner must imply a new rule into *McGurran v. Veterans Administration*, 665 F.2d 321 (10th Cir. 1981), in order to argue conflict in the appellate courts. In *McGurran*, the court applied the balancing test and found that the interest in having the employees work outweighed the expression of posting signs all over the plant. Simply because the balancing test favored the employer in this case does not present a split of authority. A written contract existed in *McGurran* and the Tenth Circuit weighed the interests and held accordingly.

In the present case, the prior agreement, if any, was both oral and disputed, yet the Fifth Circuit weighed it as a factor in the balancing test when considering the interest of the employer in promoting efficient public services. The Fifth Circuit properly balanced that with the employee's interest and noted that "efficiency is not an end-all and be-all goal of democracy. Speech among the people helps to maintain the vitality of self-government." *Moore v. City of Kilgore*. Furthermore, the court stated that "discipline for more abstract and attenuated management purposes that do not relate to the actual fighting of fires – the primary purpose of the Fire Department – is an interest of lesser magnitude." *Id.*

Nowhere in *McGurran* does it expressly state petitioner's proposition that one may unknowingly contract away First Amendment rights. Whether or not the City of Kilgore and Mr. Moore agreed on what he would say is irrelevant to the issue of the City penalizing Mr. Moore for protected speech.

Petitioner also mistakenly argues that the Fifth Circuit differs from the holding in *Kotwica v. City of Tucson*, 801 F.2d 1182 (9th Cir. 1986). *Kotwica* merely held that an official-speaker may not purposely misstate the official policy of the government employee. However, the Ninth Circuit in *Kotwica* explained that the employee can comment whether or not her opinion would sit well with the employer. *Id.* It is evident from all the facts that Mr. Moore did not misappropriate a position as a government spokesperson to misstate government policy. Moore was not a chosen government spokesperson. The City had its own representative at the press conference to give the

City's position on the fire and the surrounding circumstances. Moore was not misstating official policy. The policy mandating layoffs was not in dispute. Moore was disagreeing with the policy.

Moreover, the Fifth Circuit took into account the interest of the City in controlling information about its policy and explained that "the City's interest in an 'accurate' flow of information is not absolute and does not enjoy durational eternity." *Moore v. City of Kilgore*. In light of the arena in which the statements were made, which was a press conference where the City had ample opportunity to discuss official policy, it can be seen that the Fifth Circuit did not vary from *Kotwica*.

## II. There was no "agreement" to limit speech that complied with constitutional requirements

One cannot be deprived of constitutional rights unless the right or privilege was knowingly waived. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 143-146 (1967). Moreover, waivers of First Amendment rights are to be inferred only in "clear and compelling" circumstances. *In re Halkin*, 598 F.2d 176, 189 (D.C. Cir. 1979). See generally *Grandbouche v. Clancy*, 825 F.2d 1463, 1467 (10th Cir. 1987) (one cannot waive First Amendment rights merely by bringing suit); *Ostlund v. Bobt*, 825 F.2d 1371, 1373 (9th Cir. 1987) (waiver of constitutional rights must be voluntary and done knowingly; *Okeson v. Tolley School Dist.*, 760 F.2d 864, 868 (8th Cir. 1987), *rev'd on other grounds*, 766 F.2d 378 (8th Cir. 1987) (there is a presumption against waiver of a constitutional right and if waived, it must be a voluntary, intentional relinquishment or abandonment



of that privilege; acts proving waiver should be so manifestly consistent with intent to waive that there is no other reasonable explanation for the conduct).

The "clear and compelling" circumstances required for waiver of First Amendment rights are lacking here.

Mr. Moore's brief exchange with the City Manager in the absence of counsel hardly calls to mind the negotiations necessary to waive a most important right. The circumstances surrounding the chat with the City Manager make it evident that a contract did not even arise. There can be no breach if a contract never comes into being.

**III. Existing precedent on the Standard of review and burden of proof in First Amendment cases has not been shown to require re-examination**

The Fifth Circuit examined the entire record and found that Mr. Moore was entitled to correct determinations of law. The Fifth Circuit took into account the findings of the District Court in weighing the interests at stake and gave those findings proper weight.

In *Mount Healthy City School District v. Doyle*, 429 U.S. 274, 287 (1977), this Court held that the burden rested on the public employee to demonstrate that his conduct was constitutionally protected and that the protected behavior was a "substantial factor" in the employer's subsequent actions. Once this is done, the employer must show by a preponderance of the evidence that the same actions would have been taken in the absence of protected conduct. *Id.* at 287.

In the case at hand, Mr. Moore met his burden of showing that his speech was constitutionally protected. It is also evident that the City did not meet its burden of showing that Mr. Moore's punishment would have taken place in the absence of this protected speech. The newspaper article attached to the disciplinary memorandum makes it all too clear that Mr. Moore was penalized for exercising his First Amendment rights.

The *Mount Healthy* test correctly states the burden of proof that is consistent with other civil rights cases, for it has the plaintiff bear the burden of showing that the speech was constitutionally protected and that the speech was the cause of the discipline or discharge. The only burden put upon the defendant is that it must prove the affirmative defense that the employee would have been discharged even absent the protected activity. A defendant has no burden until the plaintiff has proven his case.

In this case, the City has not ever suggested that it even had a non-speech related reason for disciplining Mr. Moore. A change in the burden would not affect the outcome of this case.

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**CONCLUSION**

Respondent urges the Court to deny the petition.

Respectfully Submitted,

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